(1)

Supreme Court, U.S.
FILED

941014 DEC 6 1994

OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MIKE M. NDEFRU,

PETITIONER,

VS.

DR. PETER M.A. SHERWOOD, DR. DALE M. HAWLEY, DR. KENNETH J. KLABUNDE, DR. MICHAEL J. O'SHEA, DEAN TIMOTHY R. DONOGHUE, DEAN BRADLEY FENWICK, DEAN ELIZABETH A. UNGER,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MIKE M. NDEFRU, PETITIONER
P.O. BOX 234
MANHATTAN, KANSAS 66502-0002
(913) 537-4669

14 pp

QUESTIONS PRESENTED

1. Amendment XIV (Due Process):

A. Is it lawful for the 10th Cir. and the U.S. District Court for the District of Kansas, Topeka to wrongly associate due process with conflict over a propositional oral examination rather than with dismissal of petitioner from his career pursuit in Surface Science, in the Chemistry Department, at Kansas State University (K.S.U.), Manhattan, Kansas?

B. What is the proper function of a grievance hearing, in view of the fact that the 10th Cir. and the district court ignored violations of an illegitimate hearing held at K.S.U., from which the petitioner's dismissal from his chosen career goal was upheld, and from which the petitioner was instructed to pursue another career.

C. Does the petitioner have property and liberty interest in pursuing his chosen career in Surface Science at K.S.U.? Does dismissal of the petitioner from his chosen career pursuit in Surface Science at K.S.U. require due process? The 10th Cir. and the district court evaded addressing this issue. Both courts just claimed the petitioner was not dismissed from K.S.U.

D. Should courts uphold an illegitimate hearing even though such a hearing (1) destroyed a student's career goal, (2) gives the faculty the right to choose the students he/she would like to teach, (3) causes a student's career goal to be dictated, (4) discourages students from complaining about academics at an academic institution, (5) was deliberately arranged to evade

discussion of academic matters at an academic institution, (6) upholds a claim by educators that "originality" is judged by "faith", (7) makes students coerced accomplices to what students perceive as academic violations by educators, among other issues?

2. Amendment IV (Search and Seizure):

A. Is it reasonable and lawful for a school official to search an office just by lending or claiming to have lent an item related to academics to the individual whose office is to be searched?

B. The 10th Cir. and the district court claimed, contrary to available facts, that Respondent Sherwood, a professor at K.S.U., was not acting as a government agent when he conducted the search. Was he a government agent?

TABLE OF CONTENTS

Page

INDEX TO APPENDICES.....vii

TABLE OF AUTHORITIES CITED.....ix
CASES.....ix
STATUTES.....xi
OTHERS.....xii

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.....1

OPINIONS BELOW.....3

JURISDICTION.....3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....4

STATEMENT OF THE CASE.....4

REASONS FOR GRANTING THE WRIT.....11
1. Misstatement of issues.....11
2. Issues regarding rejection of a propositional oral examination theme.....14
3. State law and the courts.....15
4. Misapplication of cases by the district court.....17
5. The fraudulent hearing.....20
   A. Respondent Fenwick on evidence.....24
   B. Notice of hearing.....26
   C. Absence of witnesses.....27
   D. New regulations disfavored petitioner....28
   E. Grievance Committee composition.....28

TABLE OF CONTENTS

Page

F. Deliberate formation of a committee to undermine academics.....29
G. Petitioner's supervisory committee members lied a hearing.....30
H. Signalling during hearing..32
I. Subjective judgement in upholding dismissal.....33
J. Withholding recordings of hearing.....34
6. Courts ignored violations of hearing.....35
7. Abnormal judicial process: 10th Cir. ignores admission of guilt.....38
A. Ministerial actions.....41
B. Discretionary actions.....41
8. History of violations.....43
I. Respondent Sherwood.....43
II. Respondent Hawley.....43
III. Respondent Unger.....44
9. Property interest.....45
A. Diminished earnings.....45
B. Almost three-year-loss.....45
C. Job references.....46
10. Liberty interest.....46
A. Defamation.....46
B. Liberty to pursue career at a public institution..48
C. Liberty to choose career...48
D. Liberty of taking examination.....49

TABLE OF CONTENTS

Page

E. Complaining about academics, denied.....49
F. Right to grieve and to justice.....49

SEARCH AND SEIZURE.....50

CONCLUSION.....55

INDEX TO APPENDICES

APPENDIX — Page

A. Opinion of the U.S. Court of Appeals, 10th Cir. 56

B. 10th Cir.'s Denial of Petition for rehearing.....60

C. Judgement by U.S. District Court, District of Kansas, Topeka.....62

D. Opinion of U.S. District Court, District of Kansas, Topeka.....64

E. Order by U.S. District Court, District of Kansas -- Staying Discovery.....88

F. Statements by Respondents' Attorney.....91

G. 42 U.S.C. § 1983.....94

H. Fourth and Fourteenth Amendments to the U.S. Constitution.....95

I. Opinion of U.S. Supreme Court on Public School Officials and the Fourth Amendment.....97

J. Opinions of State Courts of Kansas on Regulations.....98

K. Opinion of Kansas Courts on the Fourteenth Amendment to the U.S. Constitution and Sections 1 & 2 of Kansas Constitution.....101

INDEX TO APPENDICES

APPENDIX Page

L. Regulations of Kansas State University Chemistry Department on Research Proposition Examination.....103

M. Respondent Sherwood's Letter of Dismissal of Petitioner.....105

N. Kansas State University Graduate Student Grievance Regulations.....108

O. Letter from Respondent Donoghue on Arrangements for Grievance Hearing.....111

P. Statements from Recording of Hearing Held at Kansas State University.....115

Q. Grievance Committee Statement on Dismissal of Petitioner.....123

R. Court Order to Produce Proposals.....124

S. Statements of Respondents' Attorney on Production of Proposals.....128

T. Voting Members of the Grievance Committee.....129

U. Dr. Xie's, Dr. Thomas' and Mr. Welsh's Supervisory Committee....130

V. Opinions of Respondent Donoghue on the Hearing at Kansas State University.....132

TABLE OF AUTHORITIES CITED

Page

CASES

Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978).....18, 19

Gardenshire v. Chalmers, 326 F.Supp. 1200; (D.C. Kan. 1971).....15

Hamann v. Crouch, 508 P.2d 968, 211 Kan. 852; (Kan. 1973); K.S.A. 72-5410 et seq. 16

Hammer v. Gross, 932 F.2d 842, 49 CrL 1225.....40

Harlow v. Fitzgerald, 457 U.S. 800 (1982).....40

Harris v. Blake, 798 F.2d 419, 423 (10th Cir. 1986).....21, 22

New Jersey v. T.L.O., 469 U.S. 325 (1985).....51

Newman v. Burgin, 930 F.2d 955, 960 (1st Cir. 1991).....17, 18

Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985).....20

TABLE OF AUTHORITIES CITED

Page

CASES

Shriver v. Athletic Council of Kansas State University, 564 P.2d 451, 222 Kan. 216 (Kan. 1971); K.S.A. 46-901.....15, 41

Shuffer v. Board of Trustees, (1977, 2d Dist) Cal App 3d 208, 136 Cal Pptr 527.....21

State ex rel. Tomasic v. Kansas City, Kansas Port Authority, (1981).
Heller, Francis H. The Kansas State Constitution, A Reference Guide. Westport, Connecticut: Greenwood Press Publishers, [(1993), p. 48].....16

State ex rel. Tomasic v. City of Kansas City, (1985).
Heller, Francis H. The Kansas State Constitution, A Reference Guide, [(1993), p. 48].....16

TABLE OF AUTHORITIES CITED

Page

STATUTES

Kansas Bill of Rights,

Sections 1 and 2.....16

United States Code,

42 U.S.C. § 1983.....4, 8

United States Constitution,

Fourteenth Amendment.....2, 4, 10, 16

Fourth Amendment...2, 3, 4, 50, 52, 53

TABLE OF AUTHORITIES CITED

Page

OTHERS

Black's Law Dictionary, With Pronunciations, "Qualified Immunity."6th Ed. (1990).....40

Fed. R. Civ. P. 12(b)(6).....54

K.S.U. Graduate Grievance Procedure.....5, 17, 22, 27, 29, 34

K.S.U. policy on academic misconduct.....17, 29

Regulations of the Chemistry Department.....14, 17, 25

33 ALR 3d 703 (9).....40

NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1994

MIKE M. NDEFRU,

PETITIONER,

vs.

DR. PETER M. A. SHERWOOD, DR. DALE M. HAWLEY, DR. KENNETH J. KLABUNDE, DR. MICHAEL J. O'SHEA, DEAN TIMOTHY R. DONOGHUE, DEAN BRADLEY FENWICK, DEAN ELIZABETH A. UNGER

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Mike M. Ndefru, respectfully prays that a writ of certiorari be issued to review the

judgement of the U.S. Court of Appeals for the Tenth Circuit (10th Cir.) upholding dismissal of the petitioner's Fourteenth (due process) and Fourth Amendment claims.

In upholding dismissal of the due process claim the 10th Cir. wrongly associated due process with rejection of a "propositional oral examination theme", but not with dismissal of the petitioner from his career pursuit in Surface Science, in the Chemistry Department, at Kansas State University (K.S.U.). Without consideration to legitimacy the 10th Cir. mentioned a fraudulent hearing held at K.S.U. which upheld the dismissal of petitioner from his career goal, and from which was echoed a prejudiced statement -- that the petitioner pursue another career. The case was dismissed for failure to state a claim.

In upholding the dismissal of the Fourth Amendment claim the 10th Cir. ignored among other facts the unreasonableness of the search.

OPINIONS BELOW

The opinion of the 10th Cir. appears in Appendix A (at 56). The opinions of the U.S. District Court for the District of Kansas, Topeka, appear in Appendices C and D (at 62 and 64, respectively).

JURISDICTION

The 10th Cir.'s opinion was filed on August 4, 1994. A timely Petition for rehearing was filed on August 18, 1994. The 10th Cir.'s denial of the Petition for rehearing was entered on September 7, 1994 and appears in

Appendix B (at 60). This Court's jurisdiction is invoked under Rules 10.1(a) and 10.1(c) of the U.S. Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments IV and XIV to the U.S. Constitution appear in Appendix H (at 95 & 96).

42 U.S.C. § 1983 appears in Appendix G (at 94).

STATEMENT OF THE CASE

The petitioner's complaint was filed in the U.S. District Court for the District of Kansas, Topeka, pursuant to 42 U.S.C. § 1983. His Fourteenth and Fourth Amendment rights were violated.

The petitioner was a doctoral

student at Kansas State University (K.S.U.), pursuing a career in Surface Science, in the Department of Chemistry.

Respondent Sherwood, then the petitioner's research advisor, (1) searched the petitioner's belongings, in the petitioner's office, and (2) dismissed him from his career pursuit in Surface Science at K.S.U. -- after he complained to Respondent Unger, of the K.S.U. Graduate School, about violations regarding his propositional oral examination. The letter of dismissal is reproduced in Appendix M (at 105). The petitioner was prevented from taking the examination.

Respondent Fenwick, Associate Dean of the Graduate School -- in violation of K.S.U. grievance regulations -- three times, denied the petitioner his right to grieve. Respondent Fenwick insisted on arranging for the petitioner to join

another research group although only one Surface Science program existed at K.S.U. He ignored addressing the academic problems complained. Respondents Fenwick, Unger, and Donoghue later arranged a fraudulent hearing. From the hearing, it was decided that the petitioner did not prevail. Respondent Donoghue then echoed the dictates of Respondent Fenwick -- that the petitioner join another research group. The petitioner was fraudulently dismissed from his career pursuit in Surface Science at K.S.U. He was fraudulently dismissed from K.S.U., for complaining about academics.

To justify his search of the petitioner's belongings, Respondent Sherwood claimed he was looking for nickel research papers. The petitioner had previously told Respondent Sherwood he (petitioner) had a book that could

prove violations regarding the treatment of his proposal.

The respondents' attorney filed a motion to dismiss for failure "to state a claim upon which relief can be granted." The attorney also claimed that the respondents "are entitled to qualified immunity". The attorney stated that the petitioner had no property or liberty interest to support a due process action. The attorney claimed that the petitioner was not dismissed from the university since he was notified to look for "a new major professor".

In the petitioner's response to the motion to dismiss, he showed alterations, by the respondents' attorney, of facts stated in his complaint. He stated established K.S.U. regulations that entitled him to a hearing, and showed that he had

property and liberty interest in the pursuit of his career goal.

The respondents' attorney moved the court for protective order staying discovery. Motion was granted (Appen. E, at 88).

The court later passed judgement, granting motion to dismiss (Appen. C & D, at 62 and 64). The petitioner's complaint was "dismissed for failure to state a claim upon which relief may be granted" (Appen. D, at 85). The court claimed that the petitioner was not deprived of property or liberty interest (Appen. D, at 83 & 84). The court claimed that the petitioner was not dismissed from K.S.U. (Appen. D at 85).

The court stated that "Under 42 U.S.C. § 1983, the plaintiff must establish (1) that the actions complained of were done by a person acting under color of state law, and (2)

that these actions deprived the plaintiffs of rights, privileges or immunities secured by the Constitution or laws of the United States" (Appen. D at 76).

The petitioner appealed the dismissal of the action to the United States Court of Appeals for the Tenth Circuit (10th Cir.). The petitioner stated that the district court undermined his dismissal from his career pursuit in Surface Science at K.S.U. and wrongly associated "property or liberty interest" with approval of a "proposed oral topic" (Appen. D, at 82). He added that the district court misstated issues, misapplied cases, and mentioned the fraudulent hearing without consideration to legitimacy of the hearing (appen. at 72 & 73). He also stated opinions of state courts of Kansas regarding (1) regulations

(Appen. J, at 98 and 99, Nos. 1, 2, & 3) and (2) the due process clause of the Fourteenth Amendment (Appen. K, at 101).

The respondents' attorney replied stating that the district court was right in dismissing the case, for lack of constitutional violation. However, the attorney also claimed the respondents are entitled to qualified immunity.

In its judgement, the 10th Cir. associated "due process" with rejection of a "propositional oral examination theme", but not with dismissal of the petitioner from his career pursuit in Surface Science at K.S.U. (Appen. A at 57 & 58). The 10th Cir., as did the district court, mentioned the fraudulent hearing, ignoring the need for legitimacy in a hearing. The 10th Cir. upheld dismissal of the action. No hearing was held. A

petition for rehearing was denied (Appen. B, at 61).

REASONS FOR GRANTING THE WRIT

The opinions of the district court and the 10th Cir. are misleading. The district court and the 10th Cir. have not addressed issues in this action. The judgements of both courts cannot be reasonably arrived at from a fair and just assessment of issues in this action.

1. **Misstatement of issues**:

Without citation of record, the respondents' attorney wrongly stated that the petitioner claimed that he was "deprived" of due process in the rejection ["rejecting"] of "his propositional oral examination theme in Chemistry."

Without citation the attorney also wrongly associated due process with disagreement ["disagreed"] between the petitioner and his "research Supervisory Committee" about "a suitable research topic" (Appen. D, at 64).

The need for due process in the dismissal of the petitioner from his career pursuit in Surface Science at K.S.U. was evaded. The letter of dismissal is reproduced in Appendix M (at 105).

The attorney also misused the word "committee" in the attorney's brief to the 10th Cir., even after the petitioner emphasized in his brief that no committee discussed his proposal.

The district court, Respondents Hawley and Donoghue also misused "committee". The district court used "committee" when referring to Respondent Hawley (Appen. D, at 72). Respondent

Hawley used "committee" when referring to Respondent Sherwood and himself (Appen. P, at 120, No. 13.), and when referring to himself (Appen. P, at 120, No. 15.). Respondent Donoghue gave the impression that the petitioner's supervisory committee had made a determination regarding another proposal topic (Appen. V, at 132, No. 1.).

The district court associated property and liberty interest with approval of "a proposed oral topic" but not with dismissal of the petitioner from his career pursuit in Surface Science at K.S.U. (Appen. D, 82).

In its judgment, the 10th Cir. wrongly associated of due process with rejection: ". . . the decision of members of the Chemistry Department at Kansas State University to reject" the petitioner's "propositional oral examination theme" (Appen. A, at 57).

The petitioner states that there is no basis for associating "Due process" with "Rejection," "Disagreement," or for associating "Property or liberty interest" with "Approval".

2. **Issues regarding rejection of a propositional oral examination theme:**

The 10th Cir.'s statement about "decision of members of the Chemistry Department...to reject" the petitioner's "propositional oral examination theme" (Appen. A, at 57) ignores the fact that the petitioner's Supervisory Committee comprises three individuals from the Chemistry Department and one from the Physics Department.

The 10th Cir. also ignored the fact that regulations of the Chemistry Department do not permit even the petitioner's Supervisory Committee (four members) to prevent the petitioner from

doing a complete written proposal (Appen. L, at 103). The petitioner was prevented from taking the proposal examination. The 10th Cir.'s association of the petitioner's proposal only with "members of the Chemistry Department" is incorrect. Issues in the 10th Cir.'s judgement are not representative of the case and are misleading.

3. **State Law and the Courts:**

The courts of Kansas have recognized the authority of state universities to make rules and regulations, Gardenshire v. Chalmers, 326 F.Supp. 1200; (D.C. Kan. 1971) (Appen. J, at 98, No. 1.). In Shriver v. Athletic Council of Kansas State University, 564 P.2d 451, 222 Kan. 216 (Kan. 1971); K.S.A. 46-901, to determine whether the Athletic Council of Kansas

State University was "immune from liability for negligence", rules and regulations of the University were considered (Appen. J, at 98, No. 2.). In Hamann v. Crouch, 508 P.2d 968, 211 Kan. 852; (Kan. 1973); K.S.A. 72-5410 et seq., "college policy regulations" were considered before conclusion was made that the "college was not required to reinstate teacher..." (Appen. J, at 99, No. 3.).

In State ex rel. Tomasic v. Kansas City, Kansas Port Authority, 1981 and State ex rel. Tomasic v. City of Kansas City, 1985, sections 1 and 2 of the Kansas bill of rights were held by Kansas court to "have 'much the same effect as the clauses of the Fourteenth Amendment [of the federal constitution] relating to due process and equal protection of the of the law'" (Appen. K, at 101).

The petitioner states that the courts of Kansas have recognized regulations and due process as instruments that ensue fair play, justice and proper function. K.S.U. Graduate Grievance process, K.S.U. policy on integrity in academics, and regulations of the K.S.U. Chemistry Department were violated.

4. Misapplication of Cases by the District Court:

Citing Newman v. Burgin 930 F.2d 955, 960 (1st Cir. 1991), the district court stated that the "University" does not have "'to follow any specific set of detailed procedures as long as the procedures the University actually follows are fair ones...'" (Appen. D, 83). The petitioner states that the court's statement of fairness is abstract in the light that the court

never indicated what it considered fair in the procedures followed by the respondents. A fraudulent hearing is not fair, among other violations. The district court misapplied the Newman case.

In its due process argument, the district court misapplied the Board of Curators, Univ. of Mo. v. Horowitz case, 435 U.S. 78 (1978) (Appen. D, at 78). The petitioner states that in the Horowitz case, it was noted that (1) the "decision to dismiss the student was careful and deliberate"; (2) the "record showed that the school had followed its established rules"; (3) "the standards of procedural due process had been met before dismissal occurred". The petitioner's due process rights and established rules were violated. The Horowitz case favors the petitioner's cause. The petitioner failed nothing.

Citing the Horowitz case, the district court also stated that "Courts are particularly ill-equipped to evaluate academic performance" (Appen. D, at 78). However, in this action, the district court focused (without substance) on opinions about academics and ignored violations regarding the grievance hearing, an area with which the court should reasonably be more familiar. The district court also failed to indicate that faculty members lied at the grievance hearing. Apparently the court ignored "lying" because "lying" would weaken the court's reliance on the statement of faculty members regarding academics.

Respondents, in evading to address academic matters, as evident in the formation of a Grievance Committee that was stated to be unable to understand academics (Appen. O, at 113), are

wrongly implying that K.S.U. is "ill-equipped to evaluate academic performance". K.S.U. is obviously not a court. The proper function of K.S.U., as an academic institution, is not indicated in the actions of respondents. The courts can easily establish that no legitimate reason exists for dismissal of the petitioner from his career pursuit in Surface Science at K.S.U.

Citing Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985), the district court stated that "The Supreme Court has held that academic decisions and judgments about a student, as opposed to disciplinary decisions, are entitled to deference by the courts" (Appen. D, at 78). The petitioner states that no committee (including the petitioner's Supervisory Committee) or a neutral individual at

K.S.U. has confronted the academics of the petitioner's complaint. K.S.U. is not a court. Violations in this case support that, should a student complain about academics, issues complained should be ignored, and the student be dismissed. The court can interfere when absolute and arbitrary action of the university is involved. Shuffer v. Board of Trustees (1977, 2d Dist) Cal App 3d 208, 136 Cal Pptr 527.

Citing Harris v. Blake, 798 F.2d 419, 423 (10th Cir. 1986) (Appen. at 78), the district court failed to observe that the Supreme Court's statement--that "less stringent procedural requirements attach when a school makes an academic judgement"--does not equate "less stringent" with fraudulent, unprofessional, and unfair. The petitioner also states that "less

stringent" procedures reasonably must address academics. In the petitioner's case, academics was completely and deliberately evaded. Context is lacking in the court's use of the Harris case.

The district court wrongly used cases against the petitioner's cause.

5. **The Fraudulent Hearing:**

After the petitioner was dismissed from his career pursuit in Surface Science at K.S.U., Respondent Fenwick of the Graduate School, three times, denied the petitioner his right to grieve -- a K.S.U. student right (Appen. N, at 108, Sections A & B). Respondent Fenwick insisted on arranging for the petitioner to join another research group although no other Surface Science program existed at K.S.U. Respondent Fenwick (1) said the petitioner had "not failed anything," (2) in the presence of

Respondent Unger, asked how the petitioner expected to win against one of the "strongest" Supervisory Committees he (Respondent Fenwick) had met (3) even used the petitioner's student visa status in the U.S. to threaten the petitioner.

Respondent Fenwick also told Respondent Unger: "You see, Mike was involved in an automobile accident; so, we can arrange for him to join another research group."

At the end of the meeting between the petitioner, Respondents Fenwick and Unger, after Respondents Fenwick and Unger had denied the petitioner his right to grieve, Respondent Unger said: "Sorry we cannot help you. It is usually very easy".

Respondents Fenwick and Unger undermined the petitioner's career goal, problems in academics, and the

petitioner's right to grieve. Respondent Unger gave a somber impression that students' grievance rights had been routinely, easily, denied. Respondent Unger held that destroying the petitioner's career goal was helping the petitioner.

A. Respondent Fenwick on evidence:

Respondent Sherwood had withheld three proposals (evidence) from the petitioner. Initially, Respondent Fenwick, of the Graduate School, had told the petitioner: "If they don't produce the proposals, we will know they have something to hide." Later, in denying the petitioner his right to grieve, Respondent Fenwick said, in the presence of Respondent Unger, that the proposals were, "Records" are, "History" is, unimportant. When the petitioner asked Respondent Fenwick how "Originality", a

requirement of proposal ideas (Appen. L, 103), is determined, he said "By faith." Proposals needed for the assessment of comparative treatment of students, professionalism, fairness, good faith, proper function, and originality, were termed unimportant. A fraudulent hearing was later arranged. The three proposals were withheld. Regulations of the Chemistry Department, requiring that proposal ideas be present to an audience, are against the hiding of proposals (Appen. L, at 104). Statements, made at the hearing, by Dr. James Copeland, of the K.S.U. Chemistry Department indicate that proposal ideas are not supposed to be hidden (Appen. P, at 116, No. 4.). "Originality," required of proposals, forbids hiding of proposals. Besides, Respondent Sherwood previously gave the petitioner two of the requested

proposals (Appen. P, at 118, No. 5.) but took them back when the petitioner commented on them. After the hearing, even a court order to produce the proposals was evaded (Appen. R, at 124). The respondent's attorney stated that Respondent Sherwood did not have the proposals (Appen. S, at 128, No. 1.). The petitioner sent a copy of the section of the recordings of the hearing indicating that Respondent Sherwood had the proposals (Appen. P, at 118, No. 5). The attorney then responded that Respondent Sherwood returned the proposals to the students (Appen. S, at 128, No. 2.). The petitioner's action was dismissed, without production of the proposals. In the respondents' violations, the respondents are well removed from their proper functions as educators.

B. Notice of hearing:

Respondent Fenwick -- who was supposed to help the petitioner prepare for the hearing (Appen. O, at 111) -- revoked his right to grieve then suddenly gave him one-working-day's notice of a hearing on his complaint. The petitioner had little time to prepare.

C. Absence of witnesses:

At the hearing, six witnesses were operationally absent. Respondent Fenwick, said it was the responsibility of the petitioner to arrange for the witnesses to be present (Appen. P, at 116, No. 3). However, Respondents Fenwick, Unger, and Donoghue not the petitioner had control over the witnesses. Neither the petitioner nor the grievance committee members could find, in the K.S.U. grievance regulations, Respondents Fenwick's and Donoghue's claim that the petitioner was

solely responsible for the availability of witnesses. The chairman of the grievance committee proceeded by reading section D (3) of the regulations (Appen. P, at 115, No. 2.). The outcome of the hearing was predetermined.

D. New regulations disfavored petitioner:

Respondent Donoghue made new regulations, giving the petitioner the sole responsibility in making available witnesses and evidence at the hearing (Appen. O, at 112). Respondent Donoghue contributed to the absence of witnesses and withholding of evidence.

E. Grievance Committee composition:

Respondent Fenwick formed a Grievance Committee of five voting members (faculty members) (Appen. T, at 129). The Chairman of the Committee (Dr. Iandolo) and Dr. Minocha were from

the same Department as Respondent Fenwick who had, among other violations, denied the petitioner's right to grieve. Dr. Bhalla was from the same Department as Respondent O'Shea, who was a member of the petitioner's Supervisory Committee. Fairness is not reasonably indicated in such a composition.

F. Deliberate formation of a committee to undermine academics:

Respondent Donoghue clearly stated that the Grievance Committee would be unable to understand academics (Appen. O, at 111), although K.S.U. grievance regulations require that grievance hearings focus only on academics (Appen. N, at 109, Section D.7.). K.S.U. regulations on "integrity in research and scholarly activity" also addresses academics, and even require that "Departments should conduct an informed review of the previous work of

staff and faculty members at the time of hiring and promotion." Proper function cannot be indicated in the evasion of academics at an academic institution. The hearing was controlled to focus on credentials of faculty members not on the academic substance complained.

G. Petitioner's supervisory committee members lied at hearing:

At the hearing, Respondent Sherwood read a letter in which he lied that the petitioner's office was located in Respondent Sherwood's laboratory (Appen. P, at 119, No. 9.). When questioned directly, he then said the office was not in the laboratory (Appen. P, at 119, No. 10.). Respondent Sherwood was emphatic that the petitioner's Supervisory Committee rejected the petitioner's proposal theme (Appen. P, at 118, No. 6.; No. 7.). However, the Committee never discussed

the proposal, see Respondent Hawley's statement (Appen. P, 121, No. 14.). Respondent Hawley even said there was no vote (Appen. P at 120, No. 11.). Respondents Hawley and Klabunde lied that they had taught the petitioner before they became members of the petitioner's Supervisory Committee (Appen. P, at 120, No. 12; at 122 No. 17.). However, the petitioner's Supervisory Committee was appointed on June 26, 1990. He took a course under Respondent Hawley, and another under Respondent Klabunde in Spring 1991. Respondent Klabunde's claim of not being aware of the petitioner's gas sensor proposal until at a meeting is questionable (Appen. P, at 122, No. 18). Respondent Sherwood witnessed the petitioner handing Respondent Klabunde an abstract of the topic (Appen. P, at 119, No. 8.). Respondent

O'Shea said that "we, the committee, disagreed with both propositional oral proposals" (Appen. P, at 121, No. 16.). However, he never discussed the gas sensor proposal. The committee never discussed any proposal with the petitioner. Respondent Hawley even said there was no vote (Appen. P, at 120, No. 11.). Respondent Hawley called the end of a meeting between the petitioner, Respondents Hawley and Sherwood a walk out by the petitioner on the committee (Appen. P, at 120, No. 13.). However, he had previously stated that two committee members had to leave (Appen. P, at 121, No. 14). Reliance on credentials of respondents in the execution of justice in this matter is unreasonable

H. Signalling during hearing:

There was signalling for intervention, when Respondent Sherwood

had difficulties responding to a question asked by a student, member of the Grievance Committee. Only faculty members could vote. Bias is unfair.

I. Subjective judgement in upholding dismissal:

The Grievance Committee upheld dismissal of the petitioner from his career goal in Surface Science at K.S.U. claiming "permanent damage" in the relationship between Respondent Sherwood and the petitioner (Appen. Q, at 123, and 132, No. 2.). However, damage to relationship was suppressed at the hearing as subjective (Appen. P, at 115, No. 1.). A subjective judgement was deliberately passed.

In his letter, dismissing the petitioner, Respondent Sherwood stated that the petitioner, in his complaint to Respondent Unger, also complained about the Chemistry Department (Appen. M, at

105). It can therefore be concluded that complaining also caused "permanent damage" between the petitioner and the Chemistry Department. There is no valid reason for dismissing the petitioner from his career pursuit in Surface Science. The Grievance Committee's decision violates K.S.U. grievance regulation which requires the faculty member to correct the problem (Appen. N, at 110, Section E). The problem, academics, was evaded.

J. Withholding recordings of hearing:

After the fraudulent hearing, the petitioner had to go through the U.S. District Court for the District of Kansas, Topeka, to obtain a copy of the recordings of the hearing. Respondents used their authority to conceal violations.

6. Courts ignored violations of hearing:

The district court (Appen. D, at 72) and 10th Cir. (Appen. A, at 58) mentioned the hearing but never addressed violations in it. It cannot reasonably be assumed that every hearing is just. Such an assumption would imply that the existence of district courts makes courts of appeals and supreme courts unnecessary. Upholding illegitimate hearings is not normal. Such hearings undermine fairness, a fundamental principle in the execution of justice.

To undermine the dismissal of the petitioner from his career pursuit in Surface Science at K.S.U., the district court stated that the petitioner "was encouraged to find a new major professor to complete his studies at K.S.U." and, therefore was not dismissed from K.S.U.

(Appen. D, at 85). The district court relied on a decision made by Respondent Donoghue, after the fraudulent hearing (Appen. V, at 134, No. 5.). Respondent Donoghue (1) promoted violation of the petitioner's grievance rights (2) made conclusions from the apparent (Appen. V, at 133, No. 4.), (3) falsely stated that the petitioner's "office area" was in Respondent Sherwood's laboratory (Appen. V, at 133, No. 3.), even though recordings of the hearing revealed that the office was not in the laboratory and (4) falsely stated that a bookshelf in the petitioner's office was for general use and was in the laboratory (Appen. V, at 133, No. 3.). However, Respondent Donoghue claimed he reviewed the Grievance Committee report (Appen. V, at 133). The courts relied on an invalid conclusion from a fraudulent process. Does the end justify the means? The end

fraudulently dismissed the petitioner from his career pursuit in Surface Science at K.S.U. and destroyed his career pursuit. The courts failed to address the proper function of a hearing.

The outcome of a fraudulent hearing is predetermined, dictated. In upholding the fraudulent hearing, both courts are indicating that dictatorship is an academic and a democratic policy, that it is lawful for professors to (1) dictate what they choose as facts in academics, (2) dictate students' careers, (3) choose students they want to teach and (4) destroy the career goals of students who complain about academics. Both courts are indicating that academics is unimportant at academic institutions. The petitioner has been fraudulently dismissed from his career pursuit in Surface Science at

K.S.U. The petitioner has been fraudulently dismissed from K.S.U. The courts did not address the hearing.

7. <u>Abnormal judicial process: 10th Cir. ignores admission of guilt</u>:

In the respondents' attorney's brief to the 10th Cir. the attorney stated that the "District Court...properly found" that the petitioner could not show he was "deprived of any liberty or property interest" (Appen. F, at 91, No. 1.). However, the attorney stated that "the defendants reassert their entitlement to qualified immunity" (Appen. F, at 92, No. 2.). The attorney added that "It was not clearly established at the time of the defendant's actions that Ndefru had a property or liberty interest in having the research topic of his choice approved by the Supervisory Committee,

or remaining in a particular research group or the tutelage of a particular professor" (Appen. F, at 92, No. 3.).

The district court dismissed the action claiming lack of constitutional violation (Appen. A, at 82). The qualified immunity claim acknowledges constitutional violation and error in dismissal of the case. The petitioner only had to show that "a reasonable person would have known" of the violations. The 10th Cir. ignored this fact.

The respondents' attorney also admitted that it was established at the time of the respondents' actions that the petitioner had "a property or liberty interest"; the attorney failed to state why such an establishment was not clear (Appen. F, at 92, No. 3.).

The respondents' attorney wrongly associated "property

or liberty interest" with (1) approval of a topic, (2) being in a research group, and (3) being taught by a particular professor. The attorney evaded the dismissal of the petitioner from his career pursuit in Surface Science at K.S.U.

Violations resulting from ministerial, non-discretionary, actions lack the basic reason for governmental immunity (33 ALR3d 703 (9)). Even in the performance of discretionary function, immunity is granted only when clearly established constitutional or statuatory rights, "of which a reasonable person would have known," is not violated (Qualified immunity: Black's Law Dictionary, with pronunciations, 6th Ed. 1990). Also see (1) Harlow v. Fitzgerald, 457 U.S. 800 (1982); (2) Hammer v. Gross, 932 F.2d 842, 49 CrL 1225.

A. Ministerial Actions:

Denial of the petitioner's right to grieve, formation of a biased Grievance Committee, formation of a Grievance Committee that would not understand academics, distortion of facts in a claimed review of a hearing, among other issues, are ministerial violations.

In Shriver v. Athletic Council of Kansas State University, 564 P.2d 451, 222 Kan. 216 (Kan. 1971); K.S.A. 46-901, to determine whether the Athletic Council of Kansas State University was "immune from liability for negligence," rules and regulations of the university were considered (Appen. J, at 98, No. 2.). In the petitioner's case, established regulations were violated.

B. Discretionary Actions:

A reasonable person should know that originality is not determined by faith. It is absurd to destroy or hide

proposals and claim originality. A reasonable person should know that a student should not be dismissed for complaining about academics; more so without showing that the student is wrong. A reasonable person should know that upholding a judgement that was clearly suppressed during a hearing as subjective is irrational. Reasonably, each respondent should know that a doctoral student has almost completed his/her program of study by the time the student gets to the proposal stage of the program; a career pursuit is not a game. A reasonable person should know that lying deprived the petitioner of his liberty to justice. The respondents' violations were deliberate. Besides, proper function of respondents (educators) was lacking, to support an immunity claim.

8. **History of violations:**

I. Respondent Sherwood:

A. Arranged for Dr. Xie to graduate, permitting Respondent Sherwood, not another individual, to work for the National Science Foundation.

B. Arranged for Dr. Weitzsacker to graduate, permitting Respondent Sherwood, not another individual, to obtain $220,000 in research funds

C. Respondent Sherwood prevented the petitioner from expressing that scientific ethics was being violated in his research laboratory.

D. Respondent Sherwood prevented the petitioner from expressing that equal educational opportunity was not being practiced in his laboratory.

II. Respondent Hawley:

A. Respondent Hawley was

Respondent Sherwood's principal investigator for the obtainment of funds, and must have known about the arrangement for Dr. Xie to graduate.

B. Respondent Hawley demonstrated preferential treatment of students at the Analytical Chemistry Division Seminar.

C. Respondent Hawley punished four students without due process.

III. Respondent Unger arranged a grievance hearing in which evidence (a letter from Respondent Hawley) in her possession was claimed to have been lost. It is unlikely to loose copies of the same letter from the file of four students. When the court ordered production of the letter, a letter having no signature was produced.

9. **Property Interest**:

A. Diminished earnings:

Destruction of the petitioner's career will cost him financially. Financial deprivation translates into property deprivation.

B. Almost three-year-loss:

The petitioner lost about three years, at K.S.U. He had finished all his course work and written examinations. He had done a lot of research in Surface Science. He only had to do a proposal, some research and a dissertation. He also had about three years of financial loss at K.S.U. At Eastern Kentucky University (E.K.U.), he obtained a bachelors degree in Biology (with distinction), a bachelors degree in Chemistry (with distinction), a masters degree in Biology (with a grade point average, G.P.A., of 3.69, on a 4.00 scale), and a masters degree in

Chemistry (with a G.P.A. of 3.77, on a 4.00 scale). His hard work, commitment, and source of income have been destroyed by actions of the respondents. Upon graduation from E.K.U., he had offers from four universities to pursue doctoral studies. He chose K.S.U. The respondents have destroyed his career goal.

C. Job references:

Faculty members play an important role as references in job search, for graduating students. References can determine whether the graduate gets a job, the kind of job obtained and the rank attained at a job. Lack of such references damages the petitioner financially.

10. Liberty Interest:

A. Defamation:

The district court held that a

defamation claim should be associated with dissemination of a stigmatizing defamation information to the public (Appen. D, at 84).

Actions of the defendants falsely portrayed the petitioner as incompetent, undependable, problematic and unable to complete tasks. He had to turn to the courts, seeking justice. Employers reasonably do not want to be sued and do not want incompetent employees.

The petitioner, carrying defamation label with him to job interviews, is a means of publication. Reasonably, not everybody in the public is aware of a publication. In the petitioner's case, the defamation information is published where he hopes to make a living. Neither defamation nor publication fades, as he goes from one employer to another. Lack of publication would require that the petitioner not look for

a job. The defamation label infringes on his liberty of self determination. Defamation deprives him of the liberty to be judged by his true worth and thus wrongfully deprives him of the achievements, and associations that the liberty of self-determination offers. The liberty deprived him will also cost him financially.

B. Liberty to pursue career at a public institution:

The liberty to pursue a career in Surface Science at K.S.U. must not be fraudulently denied an individual student, the petitioner.

C. Liberty to choose career:

A career is a choice, a dedication, a commitment, a "love". By fraudulently dismissing the petitioner from the Surface Science program at K.S.U., respondents have embarked on destroying, dictating, and choosing his

career.

D. Liberty of taking examination:

The petitioner was deprived of the liberty of taking the proposal examination, an examination open to all doctoral students of the Chemistry Department. The petitioner violated nothing that would prevent him from taking the examination.

E. Complaining about academics, denied:

Essentially, the petitioner was dismissed for expressing his liberty to address academic matters. Such a fraudulent dismissal cause students to become coerced accomplices to what they perceive as violations of faculty members. The principle of self determination is against such coercive actions.

F. Right to grieve and to justice:

Students' rights to legitimate

grievance hearings must not be denied an individual student. A fraudulent hearing deprived the petitioner of his right to justice.

SEARCH AND SEIZURE

Respondent Sherwood's search of the petitioner's belongings in the petitioner's office was unreasonable and unlawful.

The district court stated that the Fourth Amendment applies "only to governmental action" (Appen. D, at 86). The district court stated that "Ndefru has failed to allege sufficient facts to demonstrate that Dr. Sherwood was acting as a government agent at the time he searched for the "nickel" papers" (Appen. D, at 87).

The petitioner states that staying discovery (Appen. E at 88) prevented him

from showing that part of Respondent Sherwood's nickel-research fund goes to the Chemistry Department and K.S.U. His work on nickel is a governmental function. Also, Respondent Donoghue stated that Respondent Sherwood had "jurisdiction over" the claimed papers (Appen. V, at 133, No. 3.). Moreover, aspects of publications associated with students' research have been used in students' dissertations, K.S.U. function. Respondent Sherwood searched as a government agent. The court also ignored that the petitioner previously told Respondent Sherwood he had a book that can prove violations regarding the treatment of his proposal.

In New Jersey v. T.L.O., 469 U.S. 325 (1985), the court held that the Fourth Amendment prohibits unreasonable searches by public school officials (Appen. I, at 97). No pressing need was

indicated to permit a search. Respondent Sherwood stated that he "was working on the nickel project...on May 6th" and looked for the claimed papers "on May the 9th". He never asked or indicated he attempted to ask for the claimed papers. Besides, he could not reasonably have been able to establish that the claimed papers were in the petitioner's office and not say at the petitioner's residence. If the claimed papers were in the petitioner's office, Respondent Sherwood could not reasonably have known where they were.

Respondent Sherwood knew he was violating the petitioner's Fourth Amendment right. He gave an excuse for going through a pile of papers that he said belonged to his research group, and claimed was located in his laboratory? He said, "That's why I needed to go through the pile because they were in no

particular order." He knocks before entering the petitioner's office.

The Fourth Amendment reasonably does not hold that for a school official to conduct a search, he/she just has to lend or claim he/she lent an item associated with academics to the target of the search and search the target's office when the target is not in the office. Upholding such actions invalidates the Fourth Amendment in academic settings.

Respondent Sherwood, in a letter to Respondent Hawley, lied, calling the petitioner's office his (Respondent Sherwood's) laboratory: (1) ..."I was in my research laboratory".... (2) ..."I had the right to access my own research laboratory"....] (Appen. P, at 119, No. 9.). He repeated the lie during the hearing until questioned for distinction between office and laboratory (Appen. P,

at 119, No. 10.). At the bottom of the petitioner's copy of the letter dismissing the petitioner, Respondent Sherwood wrote, by hand, showing he knew the office was not a laboratory (Appen. M, at 107).

The district court stated that the petitioner's '"office" area was apparently located in Dr. Sherwood's research laboratory' (Appen. D, at 74). The petitioner clearly stated that his office was not in Respondent Sherwood's laboratory: "The plaintiff's belongings were in his (plaintiff's) office, not in the laboratory."
Fed. R. Civ. P. 12(b)(6) was ignored in dismissing this action (Appen. D, at 67). Respondent Sherwood's statements and credentials were unjustly favored.

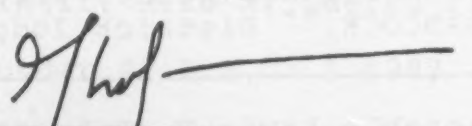
The district court added to the case: "Dr. Sherwood was looking through a pile of papers on Ndefru's desk when

Ndefru entered the room" (Appen. D, at 75). However, Respondent Sherwood claimed he was looking through papers on a shelf not on a desk. It cannot be reasonably established that the facts of this action have been addressed. No reasonable basis exists for dismissing the action.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the judgement and opinion of the Court of Appeals in this matter.

Respectfully submitted,



MIKE M. NDEFRU
Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-3021
(D.C. No. 93-CV-4127)

Filed: AUG 04 1994

MIKE M. NDEFRU,

Plaintiff-Appellant

v.

DR. PETER M.A. SHERWOOD; DR. DALE M. HAWLEY; DR. KENNETH J. KLABUNDE; DR. MICHAEL J. O'SHEA; TIMOTHY R. DONOGHUE, Dean; BRADLEY FENWICK, Dean; ELIZABETH A. UNGER. Dean,

Defendants-Appellees.

ORDER AND JUDGEMENT*

Before MOORE and KELLY, Circuit Judges, and BABCOCK,** District Judge.

**Honorable Lewis T. Babcock, District Judge, United States District Court for the District of Colorado, sitting by designation.

After examining the briefs and

appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P.

---

* This order and judgement is not binding precedent, except under doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgements; nevertheless, an order and judgement may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

The plaintiff Mike M. Ndefru filed this action under 42 U.S.C. § 1983 alleging deprivation of due process in connection with the decision of members of the Chemistry Department at Kansas State University to reject his

propositional oral examination theme. Plaintiff further contended that this decision defamed him and ultimately resulted in his dismissal from the University, and that his belongings were unlawfully searched by defendant Sherwood. A grievance hearing held by the University had earlier found against plaintiff on all issues he raised.

The district court granted defendants' motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b) (6). After careful review of the parties' arguments, the record on appeal and the relevant law, we affirm the judgement of the district court for substantially the reasons stated by that court.

The judgement of the UNited States District Court for the District of Kansas is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Paul J. Kelly, Jr
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-3021

MIKE M. NDEFRU,

Plaintiff-Appellant

v.

DR. PETER M.A. SHERWOOD; DR. DALE M. HAWLEY; DR. KENNETH J. KLABUNDE; DR. MICHAEL J. O'SHEA; TIMOTHY R. DONOGHUE, Dean; BRADLEY FENWICK, Dean; ELIZABETH A. UNGER. Dean,

Defendants-Appellees.

ORDER
Entered September 7, 1994

Before MOORE and KELLY, Circuit Judges, and BABCOCK, District Judge.

---

*Honorable Lewis T. Babcock, District Judge, United States District Court for the District of Colorado, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court

PATRICK FISHER, Chief Deputy Clerk

By Jim Powers
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JUDGEMENT IN CIVIL CASE

CASE NUMBER 93-4127-SAC

Entered on December 29, 1993

MIKE M. NDEFRU,

Plaintiff,

Vs.

Dr. PETER M. A. SHERWOOD,
Dr. DALE M. HAWLEY,
Dr. KENNETH J. KLABUNDE,
Dr. MICHAEL J. O'SHEA,
Dean TIMOTHY R. DONOGHUE,
Dean BRADLEY FENWICK,
Dean ELIZABETH A. UNGER,

Defendants.

Jury Verdict. This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motion to dismiss is granted. IT IS FURTHER ORDERED that

plaintiff take nothing; that the action be dismissed on the merits, and that the defendants Dr. peter M.A. Sherwood, Dr. Dale M. Hawley, Dr. Kenneth J. Klabunde, Dr. Michael J. O'Shea, Dean Timothy R. Donoghue, Dean Bradley Fenwick, and Dean Elizabeth A. Unger recover of the plaintiff Mike M. Ndefru, their costs of action.

ENTERED ON THE DOCKET: 12/29/93

December 29, 1993
(Date)

RALPH L. DeLOACH
(Clerk)

_____
(By) Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 93-4127-SAC

Entered on December 29, 1993

MIKE M. NDEFRU,

Plaintiff,

Vs.

Dr. PETER M. A. SHERWOOD,
Dr. DALE M. HAWLEY,
Dr. KENNETH J. KLABUNDE,
Dr. MICHAEL J. O'SHEA,
Dean TIMOTHY R. DONOGHUE,
Dean BRADLEY FENWICK,
Dean ELIZABETH A. UNGER,

Defendants.

MEMORANDUM AND ORDER

On June 7, 1993, the plaintiff, Mike M. Ndefru, filed a 253-page complaint alleging claims under 42 U.S.C. § 1983. Ndefru, in substantial detail, claims that the defendants have deprived him of due process in the rejection of his propositional oral examination theme in chemistry at Kansas

State University (KSU). Ndefru contended that this action ultimately resulted in his dismissal from KSU. Ndefru also claims that Dr. Sherwood unlawfully searched his belongings. Ndefru claims that this search of his belongings violated his rights as guaranteed by the Fourth Amendment and Fourteenth Amendments. Ndefru claims total damages in the amount of $5,612,000.

This case comes before the court upon the defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b) (6). The defendants argue that the plaintiff has not been deprived of a liberty or property interest. The defendants also argue that even if the plaintiff was deprived of a liberty or property interest, the plaintiff has plead insufficient facts to indicate that they acted arbitrarily, capriciously or in

bad faith in depriving the plaintiff of such an interest. The defendants argue that plaintiff's Fourth Amendment claim must fail as Dr. Sherwood's action did not deprive the plaintiff of his right to be free from unreasonable searches and seizures by the government. The defendants also contended that they are entitled to qualified immunity.

Ndefru has filed a 29-page response to the defendants' motion to dismiss. In that response, Ndefru challenges the defendants' factual summation of his complaint. Ndefru argued that the defendants cannot redraft his complaint so as to ignore the specific facts alleged. Ndefru contends that it is clear that his claim should survive the defendants' motion to dismiss.

The court, having carefully considered the briefs of the parties, the plaintiff's voluminous complaint,

and the applicable law; is now prepared to rule.

Standards for granting a motion to dismiss

In considering a motion for dismissal under Fed. R. Civ. P. 12(b)(6), the court must

> accept all factual allegations of the complaint as true, and draw all reasonable inferences in favor of the plaintiff." **Zilkha Energy Co. v. Leighton**, 920 F.2d, 1520, 1523 (10th Cir. 1990). Dismissal of a case pursuant to Fed. R. Civ. P. 12(b)(6) requires the legal determination that the plaintiff can prove no set of facts in support of his claim to entitle him to relief. (citations omitted).

Hospice of Metro Denver v. Group Health Ins., 944 F.2d 752, 753 (10th Cir. 1991); **see Thatcher Enterprises v. Cache County Corp.**, 902 F.2d 1472 (10th Cir. 1990).

In analyzing the plaintiff's complaint, the court has taken into consideration the fact that he appears

pro se. "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." **Hall v. Bellmon**, 935 F.2d 1106, 1110 (10th Cir. 1991). "At the same time, we do not believe it is the proper function of the district court to assume the role of advocate for the pro se litigant." **Id. See Drake v. City of Fort Collins**, 927 F.2d 1156, 1159 (10th Cir. 1991) ("Despite liberal construction afforded prose pleadings, the court will not construct arguments or theories for the plaintiff in the absence of any discussion of those issues.").

Overview[1]

Ndefru, apparently not a United States Citizen, is studying in the United States on a student visa. While at Eastern Kentucky University, Ndefru

earned a bachelors degree in Chemistry, a bachelors degree in Biology, a masters degree in Chemistry, and a masters degree in Biology. Ndefru apparently had very good grades while at Eastern Kentucky University. Following his studies at Eastern Kentucky University, Ndefru was admitted to four universities to pursue a Ph.D. degree in Chemistry. Ndefru chose KSU.

During the events relevant to this case, Ndefru was a graduate student in the Chemistry Department at KSU. Ndefru was a member of a research group composed of

---

[1]The court notes that the plaintiff's complaint is neither short nor plain as required by Fed. R. Civ. P. 8. The plaintiff's complaint is often redundant and is extremely difficult to follow. Nevertheless, the court has attempted to distill the essential aspects of the plaintiff's complaint into an accurate albeit truncated, summation of alleged facts. By summarizing the basic facts

alleged in the plaintiff's complaint, the court has simply endeavored to reduce the operative facts to a manageable level. The court has clearly scrutinized the plaintiff's complaint. In considering the plaintiff's response to each of the defendants' arguments, the court has also carefully considered the arguments advanced by the plaintiff, as well as the portions of his complaint as referenced in his response to the defendants' motion.

In short, while the court has considered all of the arguments of the parties and has scrupulously reviewed the plaintiff's complaint in its entirety, this memorandum and order will not attempt to repeat in full the substance of the arguments of the parties, nor will the court endeavor to discuss in exacting detail all 253 pages of the plaintiff's complaint.

---

graduate students in the Chemistry Department. The head of the group was Dr. Peter Sherwood, who was also Ndefru's major research advisor.

Ndefru's proposed topic for his propositional oral examination dealt with the analysis of chlorinated hydrocarbons using a gas sensor. Although Ndefru believed his proposed oral examination theme to be superior to

the topic proposed by other students, the supervisory committee rejected the plaintiff's propositional oral examination theme. Instead, the committee attempted to persuade Ndefru to work on an alternative proposal, the "Surface Science" proposal. Ndefru claims that the supervisory committee's proposal were inferior to his proposed topic.[2] Ndefru's complaint states that "[t]he committee wanted through the Surface Science project, the plaintiff to milk a rock." Ndefru claims that the committee members, each of which were closely tied to Dr. Sherwood for financial and other reasons, rejected Ndefru's proposal primarily because Dr. Sherwood was actively opposed to it.

Ndefru complains that KSU and Chemistry Department policies and regulations were not followed in

[2] The committee essentially indicated that the value of Ndefru's proposal was "minimal" as vastly superior technology to conduct the same analysis which the gas sensor would perform had already existed for thirty years. Ndefru contends that the gas sensor can provide analysis superior to analysis of available instruments at a fraction of the cost.

rejecting his proposal. Ndefru also complains that he was not provided access to copies of the other student's proposals.

At some point Dr. Sherwood, removed Ndefru from the Surface Science research group. Ndefru filed a formal complaint with the graduate school and the Chemistry Department.

On June 18, 1992, Ndefru was informed that a grievance hearing was scheduled for June 22, 1992. Ndefru's request for additional time to prepare was denied. Ndefru claims that allowing him only "one-working-day's" notice

violated his grievance-rights. In addition, Ndefru's request for other student's proposals which dad been approved was denied. The rules governing the grievance committee did not allow for cross-examination of the witnesses by Ndefru. Ndefru complains that certain witnesses were unavailable to appear at the grievance hearing. Ndefru also contends that members of the grievance committee either lacked the requisite skills and knowledge necessary to evaluate his proposal or that they were biased against him.

The grievance committee ultimately concluded that the Chemistry Department and Dr. Sherwood had treated Ndefru fairly and found against Ndefru on all of the issues he had raised. The grievance committee report which Ndefru claims was untimely prepared, was reviewed and approved by Dean Donoghue,

Dean of the Graduate School. Although Dean Donoghue indicated that KSU would arrange for Ndefru to become a member of another research group, Ndefru apparently rejected that offer. Because that Surfce Science group was the only Surface Science Group at KSU, Ndefru claims that his dismissal from the group essentially had the effect of dismissing him from KSU. Ndefru basically claims that these acts have destroyed his professional reputation. Ndefru also claims that on May 9, 1992, Dr. Sherwood was going through his belongings which were in an area shared by Ndefru and another student which served as an office for two students. Ndefru's "office" area was apparently located in Dr. Sherwood's research laboratory. Dr. Sherwood was apparently looking for papers concerning nickel which he had previously loaned to Ndefru.

Dr. Sherwood was looking through a pile of papers on Ndefru's desk when Ndefru entered the room. Ndefru objected to Dr. Sherwod's search for the papers, and now claimed this search by Dr. Sherwood violated his constitutional rights.

42 U.S.C. § 1983

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 does not create any substantive rights. **Dixon v. City of Lawton, Okl.**, 898 F.2d 1443, 1447 (10th Cir. 1990). A § 1983 claims generally describes a

substantive violation of a right secured by the Constitution or law. Id.

Under 42 U.S.C. § 1983, the plaintiff must establish (1) that the actions complained of were done by a person acting under color of state law, and (2) that these actions deprived the plaintiffs of rights, privileges or immunities secured by the Constitution or laws of the United States. See Jensen v. Redevelopment Agency of Sandy City, 998 F.2d 1550, 1556 (10th Cir. 1993); Greco v. Guss, 775 F.2d 161, 164 (7th Cir. 1985); See Dixon, 898 F.2d at 1447. Whether a person is subject to a § 1983 suit turns upon the ultimate question of whether the alleged infringement of federal rights is fairly attributable to the state. Rendell-Baker v. Kohn, U.S. 830, 838 (1982); Tarabishi v. McAlester Regional Hosp., 827 F.2d 648, 651 (10th

Cir. 1987).

Due Process

"The protection of procedural due process is not available until plaintiff establishes the existence of a recognized property or liberty interest." **South East Kansas. Comm. Action Program, Inc. v. Lyng**, 758 F. Supp. 1430, 1432 (D. Kan. 1991) (citing **Setliff v. Memorial Hosp. of Sheridan County**, 850 F.2d 1384, 1394 (10th Cir. 1988)), **aff'd**, 967 F.2d 1452 (10th Cir. 1992). "The range of interests protected by procedural due process is not infinite." **Board of Regents of State Colleges v. Roth**, 408 U.S. 564 (1972).

"The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." **Cafeteria Workers Union, Local 473 v. McElroy**, 367

U.S. 886, 895 (1961). The Supreme Court has held that academic decisions and judgements about a student, as opposed to disciplinary decisions, are entitled to deference by the courts. **See Regents of University of Michigan v. Ewing**, 474 U.S. 214 (1985); **Board of Curators, Univ. of Mo. v. Horowitz**, 435 U.S. 78 (1978) ("Courts are particularly ill-equipped to evaluate academic performance."); **Harris v. Blake**, 798 F.2d 419, 423 (10th Cir. 1986) ("The Supreme Court has emphasized that less stringent procedural requirements attach when a school makes an academic judgement about a student than when it takes disciplinary action."), **cert. denied**, 479 U.S. 1033 (1987).

In **Horowitz**, a medical student challenged her dismissal by the University of Missouri-Kansas City Medical School. The student argued that

the Medical school had not provided her with procedural due process prior to her dismissal. The Supreme Court disagreed and held that the student had received procedural due process as she had received notice of her impending dismissal and that the decision to dismiss her was careful and deliberate. 435 U.S. at 85.

Property Interest

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have legitimate claim of entitlement to it." **Id**. 408 U.S. at 577. "The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" **Logan v. Zimmerman Brush Co.**, 455 U.S. 422,

430 (1982).

Liberty Interest

In **Southeast Kansas Comm. Action Program**, this court summarized the law concerning a cause of action based upon a deprivation of a liberty interest:

> Notwithstanding the absence of a property interest, a procedural due process hearing may still be necessary if a liberty interest is implicated. **Rich v. Secretary of the Army**, 735 F.2d 1220, 1226 (10th Cir. 1984). In **Paul v. Davis**, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), the Supreme Court considered the issues of whether the plaintiff who was allegedly defamed by a flier circulated by the police department bearing his name and photograph which supposedly depicting "active shoplifters" stated a claim for relief under 42 U.S.C. § 1983 and the Fourteenth Amendment. The Court concluded that injury alone to reputation does not violate the liberty or property interests of the due process clause. The Court stated that there is "no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." **Id**. at 702. The proper remedy for such an injury is through a state tort action for defamation. **Id**. at 697-699. In **Paul**, the Court concluded that the plaintiff had suffered no constitutional injury because he could not "assert

denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment ." **Id**. at 712.

Thus, in order to present a viable liberty deprivation claim, the plaintiff must demonstrate more than a mere injury to reputation; due process requirements are not triggered unless the injury to reputation is entangled with the loss of a more tangible interest. **See Setliff**, 850 F.2d at 1396. The plaintiff is also required to demonstrate that the publication of information was false and stigmatizing. **See Derstein v. State of Kan.**, 915 F.2d 1410 (10th Cir. 1990); **Conaway v. Smith**, 853 F.2d 789, 794 (10th Cir. 1988); **Sipes v. United States**, 744 F.2d 1418, 1421 (10th Cir. 1984).

. . .

A statement is not stigmatizing if it merely alleges incompetence, negligence, low productivity and dereliction. **See Sullivan v. Stark**, 808 F.2d 737, 739 (10th Cir. 1987). In order for a statement to be stigmatizing, a statement must allege dishonesty, stealing or some other allegation that gives rise to a 'badge of infamy,' public scorn or the like. **See Wells v. Hico Independent School Dist.**, 736 F.2d 243, 256 n. 16 (5th Cir. 1984); **Bailey v. Kirk**, 777 F.2d 567, 580, n. 18 (10th Cir. 1985).

758 F. Supp at 1433-1434; **See Jensen**,

998 F.2d at 1558-1559.

Analysis

Due Process Claim

As the defendants suggest, Ndefru has failed to demonstrate that he was deprived of a liberty or property interest. Essentially, the plaintiff's case boils down to whether a university student has a property or liberty interest in having a proposed oral topic approved by his teachers and academic advisors. Simply put, Ndefru does not have a property or liberty interest in having his proposed topic on a gas sensor approved, irrespective of the fact that he may regard his proposed topic to be superior to topics approved for other students, and irrespective of his self-appraisal of the relative merits of his topical proposal and his academic advisors' recommended or required course of study. The plaintiff's disappointed expectations of

researching a preferred topic are not a basis for any cognizable liberty or property interest. Nor does the fact that Ndefru's subsequent effort to overrule the decision of his academic advisors regarding his topical proposal were unsuccessful implicate a liberty or property interest.[3] In short, the plaintiff's complaint does not allege a sufficient factual basis to demonstrate that the defendants' actions have deprived him

---

[3] Ndefru's complaint on several occasions challenges the defendants' adherence to the applicable rules and regulations in considering his proposed topical area and in addressing his subsequent grievance. The court simply notes that the defendants' failure to rigidly adhere to the University's rules and regulations would not, and of itself, serve as a basis for a § 1983 claim. **See Newman v. Burgin**, 930 F.2d 955, 960 (1st Cir. 1991) ("The Due Process Clause of the Constitution . . . does not require the University to follow any specific set of detailed procedures as long as the procedures the

University actually follows are basically fair ones. . .").

---

of any liberty or property interest.[4]

Ndefru's claim that he has been deprived of liberty interest in his good name and reputation and his ability to pursue a career in Chemistry fails for at least two reasons. First, there is no allegation that any of the unfavorable information about Ndefru has been disseminated to the public; the intra-university dissemination of this information cannot serve as basis for this claim. **Harris**, 798 F.2d at 422-23 n. 2. Second, from the allegations found in Ndefru's complaint and the arguments made in his response to the defendants' motion, it does not appear that the defendants' actions and statements concerning his competency are stigmatizing. Moreover, "[d]amage to prospective employment opportunities is

too intangible to constitute deprivation of a liberty interest." **Jensen**, 998 F.2d at 1559.

In sum, Ndefru's due process claims are dismissed for failure to state a claim upon which relief may be granted.

Fourth Amendment Claim

The Fourth Amendment to the United States

---

[4] The plaintiff makes the blanket assertion that the defendants' actions ultimately lead to his dismissal from KSU. While such allegations might implicate a property or liberty interest, that allegation is not factually supported by a fair reading of the entire complaint. In fact, it appears that once the grievance committee's decision was reached, Ndefru was encouraged to find a new major professor to complete his studies at K.S.U.

Constitution protects a person's right to be secure from unreasonable searches and seizures. **United States v. Walsh**, 791 F.2d 811, 814 (10th Cir. 1986). The

Fourth Amendment to the Constitution is applicable to the states through the Fourteenth Amendment. **Mapp v. Ohio**, 367 U.S. 643 (1961). "The protections of the fourth amendment, however, apply only to governmental action; a search or seizure, even if unreasonable, performed by a private person not acting as a government agent or in concert with a government official is not within the scope of the fourth amendment." **Walsh**, 791 F.2d at 814 (citing **United States v. Jacobsen**, 466 U.S. 109, 113 (1984)). "The test for determining that one is acting as a government agent is whether 1) the government knew and acquiesced in the intrusive conduct; and 2) the party performing the search intended to assist law enforcement efforts or further his own ends." **United States v. Love**, 999 F.2d 448, 450 n.4 (10th Cir. 1993) (citing **Pleasant v. Lovell**, 876 F.2d

787, 797 (10th Cir. 1989)).

Assuming, **arguendo**, that Ndefru had a reasonable expectation of privacy in the pile of papers which Dr. Sherwood searched, and assuming, **arguendo**, that Dr. Sherwood's search was unreasonable under the circumstances, Ndefru has failed to allege sufficient facts that Dr. Sherwood was acting as a government agent at the time he searched for the "nickel" papers. Therefore, Ndefru's Fourth Amendment necessarily fail.

IT IS THEREFORE ORDERED that the defendants' motion to dismiss (Dk. 12) is granted.

Dated this 29th day of December, 1993, Topeka, Kansas.

Sam A. Crow, U.S. District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 93-4127-SAC

Entered: August 30, 1993

MIKE M. NDEFRU,

Plaintiff,

v.

DR. PETER M. A. SHERWOOD,
et al.,

Defendants.

MEMORANDUM AND ORDER

This matter is before the court on defendants' Motion for Protective Order Staying Discovery Pending Determination of Qualified Immunity. (Doc. 14.)

Fed. R. Civ P. 26(c) provides:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending. . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or

> undue burden or expense, including . . . that the discovery not be had.

The decision whether to stay discovery addresses the sound discretion of the court. McSurely v. McClellan, 426 F. 2d 664 (D.C. Cir. 1970). The party opposing discovery bears the burden of persuasion to demonstrate that discovery should be barred. Roesberg v. Johns-Manville Corp., 85 F.R.D. 292, 297 (E.D. Pa. 1980). While the general policy in this district is not to stay discovery even though dispositive motions are pending,[1] the court finds that good cause has been shown for granting the requested stay. All discovery in this case shall be stayed until further order of the court.

Copies of this order shall be mailed to plaintiff and counsel of record for the parties.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this 27th day of August, 1993.

RONALD C. NEWMAN
U.S. Magistrate Judge

---

[1] Thies v. Hudson Food, Ind., unpublished No. 88-4002 (D. Kan. April 18, 1988) (VanBebber, M.J.); First Bank of Troy v. Commerce Bank of St. Joseph, unpublished No. 85-2174 (D. Kan. October 21, 1985) (Rushfelt, M.J.).

APPENDIX F

STATEMENTS BY RESPONDENTS' ATTORNEY, HON CHERYL G. STRECKER (in respondents' brief, dated: April 22, 1994, to the 10th Cir.; Case No. 94-3021)

No. 1.

The District Court, in analyzing Ndefru's complaint under the foregoing standards (Doc. 18 at 3, 7-8), nonetheless properly found that the complaint did not contain sufficient allegations which would support a claim that Ndefru had been deprived of any liberty or property interest (Doc. 18 at 11-13). The essence of Ndefru's due process claim is that his research Supervisory Committee unfairly disagreed with him about what would be a suitable research topic for his propositional oral examination in Chemistry. He further asserts that Dr. Sherwood unfairly removed him from his student research group (at 8).

No. 2.

The District Court, in ruling in favor of the defendants on the merits of the case, did not reach the issue of qualified immunity. However, as the District Court's decision is reviewed de novo, the defendants reassert their entitlement to qualified immunity here.

The doctrine of qualified immunity provides that government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Rozek v. Topolnicki, 865 F.2d 1154, 1157 (10th Cir. 1989) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)) (at 19 & 20).

No. 3.

It was not clearly established at

the time of the defendant's actions that Ndefru had a property or liberty interest in having the research topic of his choice approved by the Supervisory Committee, or remaining in a particular research group or the tutelage of a particular professor (at 21).

APPENDIX G

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX H

FOURTH AMENDMENT TO THE
U.S. CONSTITUTION

The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT TO THE
U.S. CONSTITUTION

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

APPENDIX I

OPINION OF THE U.S. SUPREME COURT ON PUBLIC SCHOOL OFFICIALS AND THE FOURTH AMENDMENT

In determining whether the search at issue in this case violated the Fourth Amendment, we are initially faced with the question whether that Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. We hold that it does. New Jersey v. T.L.O., 469 U.S. 325, (1985); (Michael Imber and Tyll Van Geel, Education Law, New York: McGraw-Hill Inc., 1993, at 215).

APPENDIX J

OPINION OF STATE COURTS ON REGULATIONS AT ACADEMIC INSTITUTIONS

No. 1.

Tax-supported state university has the inherent authority to promulgate rules and regulations and to establish standards of conduct for those attending the institution and has the authority to protect itself, its property, and other students in attendance. Gardenshire v. Chalmers, 326 F.Supp. 1200; (D.C. Kan. 1971).

No. 2.

Athletic council which has the exclusive right to maintain and operate an intercollegiate program on land owned or controlled by Kansas State University, which is operated as a department of the University and subject

to the University's regulations and administrative policies, whose funds are held and administered by the University fiscal offices, the budget for which is prepared according to the same standards as other University departments, and whose salary levels follow the same criteria as those in other departments of the University is an instrument of Kansas State University and immune from liability for negligence." Shriver v. Athletic Council of Kansas State University, 564 P.2d 451, 222 Kan. 216 (Kan. 1977); K.S.A. 46-901

No. 3.

Where college refused to employ teacher at end of leave of absence or sabbatical leave, college policy regulations provided that teacher would "if possible" be reinstated in position similar to position held when leave was

granted, and teacher departed on leave with knowledge that college interpreted regulations as not requiring that he be rehired when he returned, college was not required to reinstate teacher on his return and teacher was not entitled to damages for breach of employment contract. Hamann v. Crouch, 508 P.2d 968, 211 Kan. 852; (Kan. 1973); K.S.A. 72-5410 et seq.

APPENDIX K

OPINION OF KANSAS COURTS ON SECTIONS 1 & 2 OF THE KANSAS CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION

SECTION 1.

In more recent years the Kansas court has declared (e.g., in State ex rel. Tomasic v. Kansas City, Kansas Port Authority, 1981, and State ex rel. Tomasic v. City of Kansas City, 1985) that this section and section 2 of the state bill of rights have "much the same effect as the clauses of the Fourteenth Amendment [of the federal constitution] relating to due process and equal protection of the of the law." Modern cases usually treat sections 1 & 2 together and apparently see no distinction between the two. Heller,

Francis H. The Kansas Constitution and Commentary, A Ref. Guide. Westport, Connecticut: Greenwood Press (1993), p. 48.

APPENDIX L

REGULATIONS OF THE KANSAS STATE UNIVERSITY CHEMISTRY DEPARTMENT REGARDING THE RESEARCH PROPOSITION EXAMINATION

The subject of the research proposition examination must deal with an original research idea. The research proposal must be of genuine scientific significance and not merely a collection of data or a minor extension of existing knowledge. The research proposal must not be directly related to the student's own research work; judgement of the student's Supervisory Committee on this point will stand.

The research propositional oral examination will be administered by the student's Supervisory Committee with the student's research director serving as Chairperson. For the student, the

examination consists of (a) preparing a complete written research proposal, (b) submitting this proposal to his/her Supervisory Committee for approval of the topic, and (c) defending this proposal before an audience of the Department and the Supervisory Committee.

APPENDIX M

LETTER OF DISMISSAL OF PETITIONER
WRITTEN BY RESPONDENT SHERWOOD

Department of Chemistry
Willard Hall
Manhattan, Kansas 66506-3701
913.532.6665
FAX: 913.532.6666

Mike Ndefru May 10, 1992
Department of Chemistry
CAMPUS

Dear Mike:

It is clear from recent events, especially your views expressed in a letter to Dean Unger on Friday May 8, that you do not regard me as a person who can fairly and impartially evaluate the quality of scientific research. You also make clear that you feel that this impartiality extends to the Chemistry Department as a whole. It is thus not possible for me to give you the guidance in your research that is required in order for me to act as your Research

Advisor.

Your current contract as a research assistant funded by my NSF grant expires on May 17 1992. Since I will no longer be your Research Advisor I will not be able to provide you with further financial support from research projects under my direction.

I hope that you find another Institution or Organization that will provide you with an environment with which you can feel comfortable, and in which you can pursue your career goals.

It is with great sorrow that I learn about your views, and I wish you a

successful and fulfilled future.

Sincerely yours,

Peter M.A. Sherwood
Professor of Chemistry

P.S.

I would very much appreciate it if you could leave materials (laboratory notes, spectra and instrumental data and copies of research papers) that relate to your research project in my laboratory when you leave. Any material that we publish that includes your work will of course acknowledge your contribution. Thank you.

cc Dr. M. Dale Hawley

P.P.S

Please return your laboratory, office and my outer office keys by the end of the semester, May 13

APPENDIX N

KANSAS STATE UNIVERSITY GRADUATE STUDENT GRIEVANCE PROCEDURES (p. 67)

A. If a graduate student feels he or she has been unjustly treated in some aspect of academic work and has been unable to secure a remedy through the normal channels (e.g., consultation with the professor(s) involved, with the supervisory committee, and thereafter with the head of the department or chair of the program), it is the student's prerogative to take the matter to the dean of the Graduate School.

B. Should the dean be unable to arrive at a mutually acceptable solution with the persons concerned, at the student's request an ad hoc committee shall be appointed by the dean to

investigate the case and make recommendations.

C. The hearings conducted by the committee shall include presentation of a written complaint by the student with additional oral comments if so desired, testimony by all faculty members directly involved, and whatever written records are pertinent.

D.3. The complainant will appear, make a presentation stating the problem and the desired remedy, and make additional comments as appropriate. At this time the committee shall hear from those persons that the complainant has notified the chair in advance, will be there to provide supporting information.

D.7. In so far as the committee's authority pertains only to academic

matters, no testimony or discussion will be permitted that concerns issues extraneous to its authority.

E. The written recommendation of the majority of the committee shall be delivered to the deah for transmission to the student and faculty member(s).

If the judgement is against the student, there is no further recourse within the university system.

If the judgement is in he student's favor, the faculty member(s) shall either act within ten days to redress the grievance or appeal the recommendation to the Graduate Council for action.

APPENDIX O

KSU KANSAS STATE UNIVERSITY

Vice Provost of Research
Dean of the Graduate School

108 Anderson Hall
Manhattan, Kansas 66506-0113
913.532.5110
FAX: 913.532.7639

17 June 1992

Mr. Mike Ndefru
P.O. Box 234
Manhattan, KS 66502

Dear Mr. Ndefru:

I have received your hand-delivered letter of June 16, 1992 requesting that I appoint an ad-hoc committee to hear your grievance. While there is much documentation accompanying your letter, I see no clear statement of the specific issue(s) that you wish to have grieved, or of the specific redress you seek so that the ad-hoc grievance committee can respond to your concerns directly and properly. In preparing those statements

you may wish to consult with Dr. Bradley Fenwick, Associate Dean in the Graduate School, or Ms. Dianne Urban, the attorney housed in the student government offices in the Union. Since I am out of the office for professional reasons until 30 June 1992, I am delegating the formal appointment of the ad-hoc committee to Dean Fenwick, and he should be coordinating time and location with you shortly.

Procedures for the grievance hearing require that you must arrange your own presentation in support of your grievance. That procedure applies both to documentation you wish considered by the committee as well as the individuals you may choose to invite to speak on your behalf. Now, while you request that Professor Sherwood provide research proposals for three specific

individuals, those materials are the property of the individuals named and you will need to obtain copies of those materials directly from those individuals if you feel that they bear on this grievance and you desire to have them considered as part of the grievance hearing. Let me also advise you that the ad-hoc grievance committee will not be composed of chemists and hence the committee will not review or act on any subject matter pertinent to the academic discipline, as they will not be qualified to do so. Academic matter of substance require highly skilled expertise in the discipline and hence remain well outside the sphere of responsibility of this committee. It is however the principal responsibility of this committee to determine if you have been treated fairly according to university and department policies, in a

manner consistent with that accorded other students in the program, and you may wish to take that into consideration as you prepare your grievance.

I trust that this letter addresses points raised in your letter of June 16, 1992

Sincerely,

Timothy R. Donoghue
Vice Provost and Dean

cc: B. Fenwick
P. Sherwood
M.D. Hawley
D. Urban

APPENDIX P

STATEMENTS FROM RECORDINGS OF THE HEARING HELD AT KSU (transcribed by petitioner):

DR. JOHN IANDOLO (chairman of Grievance Committee)

No. 1.

A grievance committee member asked petitioner: With your lack of confidence at this time do you . . . it will be in your interest to be reinstated in his group if you don't have confidence in him and he may not have in you?

Dr. Iandolo: That's a subjective question. I'm not going to allow it, period.

No. 2.

Well the issue that is important is number three, is the complainant will appear, make a presentation stating the problem and desired remedy, and make additional comments as appropriate. At

this time the committee shall hear from those persons that the complainant has notified the chair, in advance, will be there to provide supporting information.

RESPONDENT FENWICK
(on witnesses)

No. 3.

Mr. Chairman maybe I can clarify. The grievance procedure I think it say clearly that both the complainant and the "definitively" I use those terms have the responsibility of presenting those people to the committee. I interpret that as meaning it's their responsibility of having them present, and arrange for their attendance.

DR. JAMES COPELAND
(on proposal availability)

No. 4.

Dr. John Iandolo (chairman of Grievance Committee): Dr. Copeland, on

the end, will serve as a person, as a resource person for policies and procedures within the Chemistry Department.

Grievance Committee member: I would like to ask traditionally to whom is the full document of a proposal distributed within the Chemistry Department? Is it to the student's committee only? Is it to the entire Department?

Dr. Copeland: ...certainly to the committee and usually to the other graduate students and faculty members within a Division of the Department. Beyond that it's the student's desire what he or she wants to do....

Grievance Committee member: So this is the full document of a proposal which is essentially an examination.

Dr. Copeland: Yes.

Grievance Committee member: Is

given widely through out the Department.

Dr. Copeland: At least within the Division, Yes.

RESPONDENT SHERWOOD

No. 5.

Eh he asked me if I had eh any propositional oral reports of other members of the group and I looked in my file and I found two.

. . . so I handed them him two of these . . . .

No. 6.

Absolutely. In fact, if if uh if the committee had a different view, if my colleagues had felt that this was really uhm a very fine proposal then I would have uhm uhm adjusted my views accordingly.

No. 7.

There was uh uh unanimity amongst the faculty as to the nature of this particular topic.

No. 8.

. . . some two or three minutes later, as I walked out of the building I saw him handing the original topic to Professor Klabunde.

No. 9.

. . .I made it clear that I had the right to access my own research laboratory.

No. 10.

Uhm, we have uh uh a range of rooms. We don't have desks in the laboratory because of course of chemicals . . . .

RESPONDENT HAWLEY

No. 11.

As far as actually a vote or any other discussion concerned there wasn't any.

No. 12.

Grievance Committee member asked Respondent Hawley: Prior to you joining the advisory committee for the student, had you met and talked with the student?

Respondent Hawley: I've had Mr. Ndefru as a student in one of my classes, yes.

No. 13.

Mr. Ndefru charged the committee with political motivations, and that there was favoritism shown among the faculty members for other students and he proceeded to leave the room.

No. 14.

During the period of time, a couple of faculty members had other appointments and had to leave . . . .

No. 15.

What we tried to point out was that this type of technology, uh while perhaps uh uh uh uh minimal, what he ws proposing, there was existing technology that was vastly superior.

RESPONDENT O'SHEA

No. 16.

. . . I am happy I guess with uh uh the outcome in the sense that we, the committee, disagreed with both propositional oral proposals.

RESPONDENT KLABUNDE

No. 17.

Grievance Committee member asked Respondent Klabunde: Did you know Mr. Ndefru before you were asked to serve on his committee and did he know you?

Respondent Klabunde: Yes, he has been in one of my classes, and we've talked on occasions.

No. 18.

. . . he then proceeded to propose a project that I had never heard about to that point. That was the chlorocarbon-sensor business.

APPENDIX Q

GRIEVANCE COMMITTEE STATEMENT REGARDING DISMISSAL OF PETITIONER
(From letter of Chairman of the Grievance committee, Dr. John J. Iandolo, to Respondent Donoghue).

Dated: July 2, 1992

Mr. Ndefru feels that Dr. Sherwood improperly dismissed him from the research group.

-the committee agreed unanimously that the working relationship between Mr. Ndefru and Dr. Sherwood was permanently damaged and that Dr. Sherwood acted within his rights as a major professor. (vote: 5, in favor of Dr. Sherwood's actions/0, opposed) (at 2, § 3).

APPENDIX R

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION
Case No. 92-4121-S

Entered: December 8, 1992

MIKE M. NDEFRU,

Plaintiff,

v.

KANSAS STATE UNIVERSITY,

Defendant.

MEMORANDUM AND ORDER

Under consideration are the following motions:

1. Plaintiff's Motion to Subpoena Documents (doc. 23)

2. Plaintiff's Motion to Compel Response to interrogatories (doc. 26)

Plaintiff requests that the court issue a subpoena requiring defendant of Dr. Peter Sherwood, professor of

Chemistry at Kansas State University to produce proposals by Yaoming Xie, Sajan Thomas and Ian Welsh. Plaintiff also requests that the court issue a subpoena requiring defendant to produce a certain letter from the KSU Chemistry Department to the KSU Graduate Department. No opposition to the plaintiff's requests have been filed.

D. Kan. Rule 206(g) provides:

> If a respondent fails to file a response within the time required by this rule, the motion will be considered and decided as uncontested motion, and ordinarily will be granted without further notice.

The court considers plaintiff's motion as uncontested. The court will not issue a subpoena as requested, rather, defendant is directed to produce the proposal of Yaoming Xie, Sajan Thomas, and Ian Welsh, if they are in defendant's possession or the possession of Dr. Peter Sherwood and were delivered

to him as Professor at the Kansas State University in the ordinary course of business. The proposals shall be produced within 10 days of the date of filing of this order.

As to the letter sent by the Chemistry Department, the court grants plaintiff's request and orders production of the letter within 10 days of the date of filing of this order.

Plaintiff seeks an order compelling defendant to fully respond to Interrogatory Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 17, 18, 20, 21, 22 and 23. Defendant has failed to file timely opposition to plaintiff's motion.

The court considers plaintiff's motion as uncontested and grants it without further notice. Defendant shall answer the aforementioned within 20 days of the date of filing of this order.

In summary, plaintiff's Motion to

Subpoena Documents (doc. 23) and Motion to Compel Response to Interrogatories (doc. 26) are granted.

Copies of this order shall be mailed to plaintiff and counsel of record for the parties.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this 8th day of December, 1992.

RONALD C. NEWMAN
U.S. Magistrate Judge

APPENDIX S

RESPONSE BY RESPONDENTS' ATTORNEY, RICHARD H. SEATON, TO COURT ORDER FOR PRODUCTION

No. 1.
(Response dated: December 15, 1992):

Neither defendant Kansas State University nor Dr. Peter Sherwood is in possession of the proposals by Yaoming Xie, Sajan Thomas and Ian Welsh. Copies may possibly be in the possession of the named students authoring the said proposals.

No. 2.
Response (dated: December 21, 1992) to petitioner's interrogatories:

Professor Sherwood has returned his copies of Dr. Xie's thesis and Mr. Welsh's thesis to the students. (at 5)

APPENDIX T

THE FIVE VOTING MEMBERS OF THE GRIEVANCE COMMITTEE AND THEIR "DEPARTMENTS" AT KSU (Informatioin obtained from the recordings of the hearing)

Dr. Donald Roufa; Biology

Dr. Harish Minocha; Veterinary Medicine

Dr. Chandler Bhalla; Physics

Dr. Frank White; Plant Pathology

Dr. John Iandolo; Pathology

APPENDIX U

COMPOSITION OF DR. YAOMING XIE'S, DR. SAJAN THOMAS', AND MR. IAN WELSH'S SUPERVISORY COMMITTEE -- Stated by respondents' attorney Hon. Richarcd H. Seaton in his reponse to the petitioner's interrogatories in Mike M. Ndefru v. Kansas State University. Case No. 92-4121-S (1992) Response dated: October 12, 1992

Dr. Yaoming Xie

Professor Peter M.A. Sherwood;

Chemistry

Professor Kenneth J. Klabunde;

Chemistry

Professor William G. Fately;

Chemistry

Professor Barbara M. Reagan; Clothing,

Textiles and Interior Design

Dr. Sajan Thomas

Professor Peter M.A. Sherwood;

Chemistry

Professor W. G. Fately; Chemistry

Professor K.P. Purcell; Chemistry

Professor Michael J. O'Shea; Physics

Mr. Ian Welsh

Professor Peter M.A. Sherwood;

Chemistry

Professor M. Dale Hawley; Chemistry

Professor W. G. Fately; Chemistry

Professor Michael J. O'Shea; Physics

(Response to Interrogatory No. 3; at 4).

APPENDIX V

STATEMENTS FROM RESPONDENT DONOGHUE'S LETTER (Regarding the hearing held at Kansas State university).

Dated: 12 August 1992

No. 1.

I also understand that you refused to accept the committee determinations relative to a topic that had been the subject of prior discussion with your major advisor, Professor Sherwood, and which Professor Sherwood had found unacceptable (at 1).

No. 2.

Issue #3, as constructed by the Grievance Committee, is the claim that Professor Sherwood improperly dismissed you from his research group. The Grievance Committee agreed that there has been permanent damage to the relationship between you and Professor

Sherwood as a result of your actions, and that Professor Sherwood acted within his rights as a major professor in requesting that you seek another professor as major advisor (at 2)

No. 3.

. . . those materials are owned by the University for use by the principal investigator. Thus, the materials referenced which reside on a bookshelf that Professor Sherwood had placed in his laboratory for use by all project personnel were part of the sponsored project that Professor Sherwood has jurisdiction over (at 3).

No. 4.

In reviewing the committee report, I note that the committee appears to have tried to construct statements of the grievances in ways that would appear

to be favorable to you if the facts presented supported the grievance. Their negative findings on all counts state that evidence presented did not support those grievances. My review of the Committee report strongly concurs with their firm and unambiguous conclusions (at 3 and 4).

No. 5.

In conclusion, I must remind you that it is your responsibility to find a new major professor who agrees to serve in that capacity and guide your academic career from this point forward (at 4).

FILED
DEC 21 1994
OFFICE OF THE CLERK

(2)

NO. 94-1014

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

MIKE M. NDEFRU,
Petitioner,

v.

DR. PETER M.A. SHERWOOD,
DR. DALE M. HAWLEY,
DR. KENNETH J. KLABUNDE,
DR. MICHAEL J. O'SHEA,
DEAN TIMOTHY R. DONOGHUE,
DEAN BRADLEY FENWICK,
DEAN ELIZABETH A. UNGER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENTH CIRCUIT COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Cheryl G. Strecker
Counsel of Record for Respondent
Kansas State University
Office of University Attorney
111 Anderson Hall
Manhattan, Kansas 66506-0115
(913)532-5730

6 | pp

QUESTION PRESENTED

The respondents are dissatisfied with the petitioner's presentation of questions presented. Should the petition for a writ of certiorari be granted, the question presented for review should be the following:

> Did the Tenth Circuit correctly affirm the District Court's dismissal of a complaint alleging: (1) violation of a former graduate student's due process rights based on his advisory committee's rejection of his proposed oral examination topic; and (2) violation of the former student's right to be free from unreasonable searches and seizures based on allegations that his major professor looked

through papers in a shared office to retrieve documents he had loaned to the student?

TABLE OF CONTENTS

	Page
Table of Authorities.....	iv
Question Presented.....	i
Opinions and Judgments in the Courts Below.....	1
Jurisdiction.....	1
Constitutional Provisions and Statutes Involved.....	2
Statement of the Case.....	2
Summary of Argument.....	6
Reasons for Denying the Writ...	8
A. THE PETITIONER'S COMPLAINT WAS PROPERLY DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.....	8
B. THIS CASE PRESENTS NO CONFLICT OR UNSETTLED QUESTION OF LAW NECESSITATING SUPREME COURT REVIEW.....	15
C. THE PETITIONER HAS FAILED TO COMPLY WITH THE REQUIREMENTS IN SUPREME COURT RULE 14 REGARDING THE CONTENT OF A PETITION FOR A WRIT OF CERTIORARI...	17
Conclusion.....	18

TABLE OF AUTHORITIES

Page

Cases

Board of Curators, University of Missouri v. Horowitz, 435 U.S. 78 (1978)..... 12

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)..... 11

Dixon v. City of Lawton, Okl., 898 F.2d 1443 (10th Cir. 1990)..... 10

Greco v. Guss, 775 F.2d 161 (7th Cir. 1985)..... 11

Hall v. Bellmon, 935 F.2d 1106 (10th Cir. 1991)..... 9

Harris v. Blake, 798 F.2d 419 (10th Cir. 1986)..... 12

Jensen v. Redevelopment Agency of Sandy City, 998 F.2d 1550 (10th Cir. 1993).....10,13

Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985)..... 12

Rendell-Baker v. Kohn, 457 U.S. 830 (1982)..... 10

Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384 (10th Cir. 1988)..... 11

Southeast Kansas Comm. Action Program, Inc. v. Lyng, 758 F.Supp. 1430 (D. Kan. 1991)..... 11

Tarabishi v. McAlester Regional Hospital, 827 F.2d 648 (10th Cir. 1987)..... 11

Zilkha Company Energy Co. v. Leighton, 920 F.2d 1520 (10th Cir. 1990)..... 9

Statutes

42 U.S.C. §1983..... 10

OPINIONS AND JUDGMENTS IN THE COURTS BELOW

Although the petitioner presents the opinions and judgments in the courts below as Appendices A, B, C, and D to his petition, his reproduction of each contains numerous inaccuracies. Therefore, the respondents have attached hereto accurate reproductions of the opinions and judgments in the courts below as Appendices R-A, R-B and R-C.

JURISDICTION

The respondents are dissatisfied with the jurisdictional grounds stated by the petitioner. He does not indicate any statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of

certiorari, as required by Rule 14.1(e)(iv) of the Rules of the Supreme Court of the United States. Rather, he states that "[t]his Court's jurisdiction is invoked under Rules 10.1(a) and 10.1(c) of the U.S. Supreme Court." (Petition at 4)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The respondents agree with the petitioner's statement of constitutional and statutory provisions involved, which he sets forth in Appendices G and H to the petition.

STATEMENT OF THE CASE

On June 7, 1993, the petitioner filed a complaint in the United States District Court for the District of

Kansas, claiming that the respondents, who are members of the faculty and administration of Kansas State University, deprived him of due process in rejecting his proposed oral examination theme in Chemistry. The petitioner claimed that this action had the effect of dismissing him from the University. He also claimed that one of the defendants, his major professor, unlawfully searched his office by looking through a pile of research papers, in violation of the Fourth and Fourteenth Amendments to the United States Constitution. The petitioner claimed monetary damages in the amount of $5,612,500.00.

The respondents filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). On December 29, 1993, the

District Court entered an order granting the respondents' motion to dismiss, ruling that: (1) the petitioner failed to demonstrate that he had been deprived of a liberty or property interest; and (2) the petitioner failed to allege sufficient facts to demonstrate that his major professor was acting as a government agent when he allegedly searched the petitioner's papers. As the District Court ruled in favor of the respondents on the foregoing issues, it did not reach the issue of the respondents' entitlement to qualified immunity. The District Court's Judgment and attached Memorandum and Order granting the respondents' motion to dismiss is appended hereto as Appendix R-B.

The petitioner appealed the District Court's decision to the United States Court of Appeals for the Tenth Circuit, contending that the District Court ignored facts, misstated the issues, demonstrated absolute disregard for process of any form, promoted fraudulence, and advocated dictatorship in granting the motion to dismiss. On August 4, 1994, the Tenth Circuit Court of Appeals, after reviewing the parties' arguments, the record on appeal, and the relevant law, affirmed the judgment of the District Court. The Tenth Circuit's Order and Judgment is appended hereto as Appendix R-A.

The petitioner filed a petition for rehearing in the Tenth Circuit Court of Appeals. On September 7,

1994, the Court of Appeals entered an order denying the petition for rehearing. That order is appended hereto as Appendix R-C.

SUMMARY OF ARGUMENT

The District Court properly dismissed the petitioner's complaint for failure to state a claim under Fed.R.Civ.P. 12(b)(6), for the reasons stated in its Memorandum and Order. (See Appendix R-B.) The Tenth Circuit Court of Appeals properly affirmed the District Court's dismissal of the complaint.

The petitioner has failed to present any reason for this Court to grant review on a writ of certiorari. He does not raise a conflict of decisions between courts of appeals or

state courts of last resort, or an important question of federal law that has not been, but should be, settled by this Court, or a federal question that conflicts with applicable decisions of this Court. In his petition, he merely reiterates the arguments he made in the courts below, asserting the unfairness of the respondents' rejection of his proposed oral examination topic and the illegality of the alleged search of his papers by his major professor.

Furthermore, the petitioner has failed to comply with Rule 14 of the Rules of the Supreme Court of the United States, which sets forth the requirements for the content of a petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

The petitioner's statements of fact and law are confusing and replete with inaccuracies. Rather than specifically addressing each inaccuracy, the respondents adopt and refer this Court to the statements of fact and discussion of law set forth in the District Court's Memorandum and Order. (See Appendix R-B at App. 7-34.)

A. THE PETITIONER'S COMPLAINT WAS PROPERLY DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

The District Court properly granted, and the Tenth Circuit properly affirmed, the dismissal of the petitioner's complaint for the reasons stated in the District Court's Memorandum and Order. (See Appendix R-

B at App. 7-34.)

The District Court considered the motion to dismiss under the proper standard for review, accepting all factual allegations of the complaint as true, and drawing all reasonable inferences in favor of the petitioner, citing Zilkha Company Energy Co. v. Leighton, 920 F.2d 1520, 1523 (10th Cir. 1990). The District Court took into consideration the fact that the petitioner appeared pro se, citing Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). (See Appendix R-B at App. 10-12.)

Applying the foregoing standard, the District Court carefully scrutinized the petitioner's 253-page complaint, as well as the arguments advanced by the petitioner in his 29-

page response to the respondents' motion to dismiss. (See Appendix R-B at App. 12-19.)

The District Court properly set forth the elements which a plaintiff must establish in order to prevail in an action brought pursuant to 42 U.S.C. §1983; i.e., (1) that the actions complained of were done by a person acting under color of state law, and (2) that these actions deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. The District Court cited Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982); Jensen v. Redevelopment Agency of Sandy City, 998 F.2d 1550, 1556 (10th Cir. 1993); Dixon v. City of Lawton, Okl., 898 F.2d 1443, 1447

(10th Cir. 1990); Tarabishi v. McAlester Regional Hospital, 827 F.2d 648, 651 (10th Cir. 1987); and Greco v. Guss, 775 F.2d 161, 164 (7th Cir. 1985). (See Appendix R-B at App. 19-21.)

The District Court properly held that the protection of procedural due process is not available until a plaintiff establishes the existence of a recognized property or liberty interest, citing Southeast Kansas Comm. Action Program, Inc. v. Lyng, 758 F.Supp. 1430, 1432 (D.Kan. 1991) (citing Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1394 (10th Cir. 1988), aff'd, 967 F.2d 1452 (10th Cir. 1992); and Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). (See Appendix R-B at

App. 21-22.)

The District Court noted that the United States Supreme Court has held that academic decisions and judgments about a student, as opposed to disciplinary decisions, are entitled to deference by the courts, citing Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985); Board of Curators, University of Missouri v. Horowitz, 435 U.S. 78 (1978); and Harris v. Blake, 798 F.2d 419, 423 (10th Cir. 1986). (See Appendix R-B at App. 22-24.)

Analyzing the petitioner's complaint under applicable law, the District Court properly found that the petitioner did not have a property or a liberty interest in having a proposed topic of oral examination

approved by his teachers and academic advisors. While acknowledging the petitioner's assertion that the respondents' actions ultimately led to his dismissal from the University, the District Court properly found that allegation not to be factually supported by a fair reading of the entire complaint. Additionally, citing Jensen, 998 F.2d at 1559, the District Court properly held that the petitioner's claim that he has been deprived of liberty interests in his good name and reputation and ability to pursue a career in chemistry fails because: (1) there is no allegation that any of the unfavorable information about the petitioner has been disseminated to the public; (2) from the allegations made by the

petitioner, it does not appear that the respondents' actions and statements concerning his competency are stigmatizing; and (3) damage to prospective employment opportunities is too intangible to constitute deprivation of a liberty interest. (See Appendix R-B at App. 24-31.)

The District Court properly held that the petitioner's Fourth Amendment claims fail because the protections of the Fourth Amendment apply only to governmental action and, assuming arguendo that the petitioner had a reasonable expectation of privacy in the pile of papers which his major professor searched, and assuming arguendo that the search was unreasonable under the circumstances, the petitioner failed to allege

sufficient facts to demonstrate that the professor was acting as a government agent. (See Appendix R-B at App. 31-34.)

B. THIS CASE PRESENTS NO CONFLICT OR UNSETTLED QUESTION OF LAW NECESSITATING SUPREME COURT REVIEW.

Rule 10 of the Rules of the Supreme Court of the United States provides that a petition for writ of certiorari will be granted "only when there are special and important reasons therefor." S.Ct.R. 10.1. Rule 10 indicates the character of reasons that will be considered by this Court in deciding whether to grant a review on writ of certiorari. The petitioner has failed to present any such reason for this Court to grant review in this case. He does not raise a conflict of

decisions between courts of appeals or state courts of last resort, or an important question of federal law that has not been, but should be, settled by this Court, or a federal question that conflicts with applicable decisions of this Court. In his petition, he merely reiterates the arguments he made in the courts below, asserting the unfairness of the respondents' rejection of his proposed oral examination topic and the illegality of the alleged search of his papers by his major professor.

In addition to the petitioner's failure to assert any of the reasons set forth in Rule 10 or any other valid reason for this Court to grant review of this case, the respondents are not aware of the existence of any

such reason.

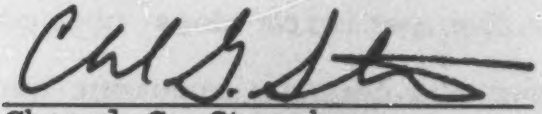
C. THE PETITIONER HAS FAILED TO COMPLY WITH THE REQUIREMENTS IN SUPREME COURT RULE 14 REGARDING THE CONTENT OF A PETITION FOR A WRIT OF CERTIORARI.

The petition does not contain a direct and concise argument amplifying the reasons relied on for allowing the writ. The petitioner has failed to present with accuracy, brevity, or clearness whatever is essential to a ready and adequate understanding of the points requiring consideration by this Court. For the foregoing reasons, the petitioner has failed to comply with Rule 14 of the Rules of the Supreme Court of the United States, which sets forth the requirements for the content of a petition for writ of certiorari.

CONCLUSION

For all of the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



Cheryl G. Strecker
Assistant University Attorney
111 Anderson Hall
Kansas State University
Manhattan, Kansas 66506-0115
(913) 532-5730

APPENDIX R-A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-3021
(D.C. No. 93-CV-4127)
(D. Kan.)

MIKE M. NDEFRU,

Plaintiff-Appellant

v.

DR. PETER M.A. SHERWOOD; DR. DALE M. HAWLEY; DR. KENNETH J. KLABUNDE; DR. MICHAEL J. O'SHEA; TIMOTHY R. DONOGHUE, Dean; BRADLEY FENWICK, Dean; ELIZABETH A. UNGER, Dean,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before MOORE and KELLY, Circuit Judges, and BABCOCK,** District Judge.

**Honorable Lewis T. Babcock, District Judge, United States District Court for the District of Colorado, sitting by designation.

After examining the briefs and

appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff Mike M. Ndefru filed this action under 42 U.S.C. § 1983 alleging deprivation of due process in connection with the decision of members of the Chemistry Department at Kansas State University to reject his propositional oral examination theme. Plaintiff further contended that this decision defamed him and ultimately resulted in his dismissal from the University, and that his belongings were unlawfully searched by defendant Sherwood. A grievance hearing held by

the University has earlier found against plaintiff on all issues he raised.

The district court granted defendants' motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b) (6). After careful review of the parties' arguments, the record on appeal, and the relevant law, we affirm the judgment of the district court for substantially the reasons stated by that court.

The judgment of the United States District Court for the District of Kansas is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

---

* This order and judgment is not binding precedent, except under the

doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

APPENDIX R-B

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS
JUDGMENT IN A CIVIL CASE

CASE NUMBER: 93-4127-SAC

MIKE M. NDEFRU,

Plaintiff,

v.

DR. PETER M.A. SHERWOOD,
DR. DALE M. HAWLEY,
DR. KENNETH J. KLABUNDE,
DR. MICHAEL J. O'SHEA,
DEAN TIMOTHY R. DONOGHUE,
DEAN BRADLEY FENWICK,
DEAN ELIZABETH A. UNGER,

Defendants.

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motion to dismiss is granted. IT IS FURTHER ORDERED that

plaintiff take nothing, that the action be dismissed on the merits, and that defendants Dr. Peter M.A. Sherwood, Dr. Dale M. Hawley, Dr. Kenneth J. Klabunde, Dr. Michael J. O'Shea, Dean Timothy R. Donoghue, Dean Bradley Fenwick, and Dean Elizabeth A. Unger recover of the plaintiff Mike M. Ndefru, their costs of action.

ENTERED ON THE DOCKET: 12/29/93

December 29, 1993
Date

Ralph L. DeLOACH
Clerk

/s/
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 93-4127-SAC

MIKE M. NDEFRU,

Plaintiff,

Vs.

DR. PETER M.A. SHERWOOD,
DR. DALE M. HAWLEY,
DR. KENNETH J. KLABUNDE,
DR. MICHAEL J. O'SHEA,
DEAN TIMOTHY R. DONOGHUE,
DEAN BRADLEY FENWICK,
DEAN ELIZABETH A. UNGER,

Defendants.

MEMORANDUM AND ORDER

On June 7, 1993, the plaintiff, Mike M. Ndefru, filed a 253-page complaint alleging claims under 42 U.S.C. § 1983. Ndefru, in substantial detail, claims that the defendants have deprived him of due process in the rejection of his propositional oral examination theme in Chemistry at

Kansas State University (KSU). Ndefru contends that this action ultimately resulted in his dismissal from KSU. Ndefru also claims that Dr. Sherwood unlawfully searched his belongings. Ndefru claims that this search of his belongings violated his rights as guaranteed by the Fourth Amendment and Fourteenth Amendments. Ndefru claims total damages in the amount of $5,612,000.

This case comes before the court upon the defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b) (6). The defendants argue that the plaintiff has not been deprived of a liberty or property interest. The defendants also argue that even if the plaintiff was deprived of a liberty or property interest, the plaintiff has

plead insufficient facts to indicate that they acted arbitrarily, capriciously or in bad faith in depriving the plaintiff of such an interest. The defendants argue that plaintiff's Fourth Amendment claims must fail as Dr. Sherwood's actions did not deprive the plaintiff of his right to be free from unreasonable searches and seizures by the government. The defendants also contend that they are entitled to qualified immunity.

Ndefru has filed a 29-page response to the defendants' motion to dismiss. In that response, Ndefru challenges the defendants' factual summation of his complaint. Ndefru argues that the defendants cannot redraft his complaint so as to ignore

the specific facts alleged. Ndefru contends that it is clear that his claims should survive the defendants' motion to dismiss.

The court, having carefully considered the briefs of the parties, the plaintiff's voluminous complaint, and the applicable law, is now prepared to rule.

Standards for Granting a Motion to Dismiss

In considering a motion for dismissal under Fed. R. Civ. P. 12(b)(6), the court must

> accept all factual allegations of the complaint as true, and draw all reasonable inferences in favor of the plaintiff." Zilkha Energy Co. v. Leighton, 920 F.2d 1520, 1523 (10th Cir. 1990). Dismissal of a case pursuant to Fed. R. Civ. P. 12(b)(6) requires the legal determination that the plaintiff can prove no set of facts in support of his claim to entitle him to relief.

(citations omitted).

Hospice of Metro Denver v. Group Health Ins., 944 F.2d 752, 753 (10th Cir. 1991); see Thatcher Enterprises v. Cache County Corp., 902 F.2d 1472 (10th Cir. 1990).

In analyzing the plaintiff's complaint, the court has taken into consideration the fact that he appears pro se. "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). "At the same time, we do not believe it is the proper function of the district court to assume the role of advocate for the pro se litigant." Id. See Drake v. City of Fort Collins, 927 F.2d 1156,

1159 (10th Cir. 1991) ("Despite liberal construction afforded pro se pleadings, the court will not construct arguments or theories for the plaintiff in the absence of any discussion of those issues.").

Overview[1]

---

[1] The court notes that the plaintiff's complaint is neither short nor plain as required by Fed. R. Civ. P. 8. The plaintiff's complaint is often redundant and is extremely difficult to follow. Nevertheless, the court has attempted to distill the essential aspects of the plaintiff's complaint into an accurate, albeit truncated, summation of the alleged facts. By summarizing the basic facts alleged in the plaintiff's complaint, the court has simply endeavored to reduce the operative facts to a manageable level. The court has carefully scrutinized the plaintiff's complaint. In considering the plaintiff's response to each of the defendant's arguments, the court has also carefully considered the arguments advanced by the plaintiff, as well as the portions of his complaint as referenced in his response to the defendants' motion.

Ndefru, apparently not a United State citizen, is studying in the United States on a student visa. While at Eastern Kentucky University, Ndefru earned a bachelors degree in Chemistry, a bachelors degree in Biology, a masters degree in Chemistry, and a masters degree in Biology. Ndefru apparently had very good grades while at Eastern Kentucky University. Following his studies at Eastern Kentucky University, Ndefru was admitted to four universities to pursue a Ph.D. degree in Chemistry.

In short, while the court has considered all of the arguments of the parties and has scrupulously reviewed the plaintiff's complaint in its entirety, this memorandum and order will not attempt to repeat in full the substance of the arguments of the parties, nor will the court endeavor to discuss in exacting detail all 253 pages of the plaintiff's complaint.

Ndefru chose KSU.

During the events relevant to this case, Ndefru was a graduate student in the Chemistry Department at KSU. Ndefru was a member of a research group composed of graduate students in the Chemistry Department. The head of the group was Dr. Peter Sherwood, who was also Ndefru's major research advisor.

Ndefru's proposed topic for his propositional oral examination dealt with the analysis of chlorinated hydrocarbons using gas sensor. Although Ndefru believed his proposed oral examination theme to be superior to the topics proposed by other students, the supervisory committee rejected the plaintiff's propositional oral examination theme. Instead, the

committee attempted to persuade Ndefru to work on an alternative proposal, the "Surface Science" proposal. Ndefru claims that the supervisory committee's proposals were inferior to his proposed topic.[2] Ndefru's complaint states that "[t]he committee wanted, through the Surface Science project, the plaintiff to milk a rock." Ndefru claims that the committee members, each of which were closely tied to Dr. Sherwood for financial and other reasons, rejected

---

[2] The committee essentially indicated that the value of Ndefru's proposal was "minimal" as vastly superior technology to conduct the same analysis which the gas sensor would perform had already existed for thirty years. Ndefru contends that the gas sensor can provide analysis superior to analysis of available instruments at a fraction of the cost.

Ndefru's proposal primarily because Dr. Sherwood was actively opposed to it.

Ndefru complains that KSU and the Chemistry Department policies and regulations were not followed in rejecting his proposal. Ndefru also complains that he was not provided access to copies of the other student's proposals.

At some point, Dr. Sherwood removed Ndefru from the Surface Science research group. Ndefru filed a formal complaint with the Graduate School and the Chemistry Department.

On June 18, 1992, Ndefru was informed that a grievance hearing was scheduled for June 22, 1992. Ndefru's request for additional time to prepare was denied. Ndefru claims that

allowing him only "one-working-day's" notice violated his grievance rights. In addition, Ndefru's request for copies of the other student's proposals which had been approved was denied. The rules governing the grievance committee did not allow for cross-examination of the witnesses by Ndefru. Ndefru complains that certain witnesses were unavailable to appear at the grievance hearing. Ndefru also contends that members of the grievance committee either lacked the requisite skills and knowledge necessary to evaluate his proposal or that they were biased against him.

The grievance committee ultimately concluded that the Chemistry Department and Dr. Sherwood has treated Ndefru fairly and found

against Ndefru on all of the issues he had raised. The grievance committee report, which Ndefru claims was untimely prepared, was reviewed and approved by Dean Donoghue, Dean of the Graduate School. Although Dean Donoghue indicated that KSU would arrange for Ndefru to become a member of another research group, Ndefru apparently rejected that offer. Because that Surface Science group was the only Surface Science Group at KSU, Ndefru claims that his dismissal from the group essentially had the effect of dismissing him from KSU. Ndefru basically claims that these acts have destroyed his professional reputation.

Ndefru also claims that on May 9, 1992, Dr. Sherwood was going through his belongings which were in an area

shared by Ndefru and another student which served as an office for the two students. Ndefru's "office" area was apparently located in Dr. Sherwood's research laboratory. Dr. Sherwood was apparently looking for papers concerning nickel which he had previously loaned to Ndefru. Dr. Sherwood was looking through a pile of papers on Ndefru's desk when Ndefru entered the room. Ndefru objected to Dr. Sherwood's search for the papers, and now claims this search by Dr. Sherwood violated his constitutional rights.

42 U.S.C. § 1983

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the

> District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 does not create any substantive rights. Dixon v. City of Lawton, Okl., 898 F.2d 1443, 1447 (10th Cir. 1990). A § 1983 claims generally described a substantive violation of a right secured by the Constitution or law. Id.

Under 42 U.S.C. § 1983, the plaintiff must establish (1) that the actions complained of were done by a person acting under color of state law, and (2) that these actions deprived the plaintiffs of rights, privileges or immunities secured by

the Constitution or laws of the United States. See Jensen v. Redevelopment Agency of Sandy City, 998 F.2d 1550, 1556 (10th Cir. 1993); Greco v. Guss, 775 F.2d 161, 164 (7th Cir. 1985); See Dixon, 898 F.2d at 1447. Whether a person is subject to a § 1983 suit turns upon the ultimate question of whether the alleged infringement of federal rights is fairly attributable to the state. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982); Tarabishi v. McAlester Regional Hosp., 827 F.2d 648, 651 (10th Cir. 1987).

Due Process

"The protection of procedural due process is not available until the plaintiff establishes the existence of a recognized property or liberty interest." Southeast Kansas. Comm.

Action Program, Inc. v. Lyng, 758 F. Supp. 1430, 1432 (D. Kan. 1991) (citing Setliff v. Memorial Hosp. of Sheridan County, 850 F.2d 1384, 1394 (10th Cir. 1988)), aff'd, 967 F.2d 1452 (10th Cir. 1992). "The range of interests protected by procedural due process is not infinite." Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

"The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961). The Supreme Court has held that academic decisions and judgments about a student, as opposed to disciplinary decisions, are entitled to deference

by the courts. See Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985); Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978) ("Courts are particularly ill-equipped to evaluate academic performance."); Harris v. Blake, 798 F.2d 419, 423 (10th Cir. 1986) ("The Supreme Court has emphasized that less stringent procedural requirements attach when a school makes an academic judgment about a student than when it takes disciplinary action."), cert. denied, 479 U.S. 1033 (1987).

In Horowitz, a medical student challenged her dismissal by the University of Missouri-Kansas City Medical School. The student argued that the medical school had not provided her with procedural due

process prior to her dismissal. The Supreme Court disagreed and held that the student had received procedural due process as she had received notice of her impending dismissal and that the decision to dismiss her was careful and deliberate. 435 U.S. at 85.

Property Interest

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have legitimate claim of entitlement to it." Id. 408 U.S. at 577. "The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed

except 'for cause.'" Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982).

Liberty Interest

In Southeast Kansas Comm. Action Program, this court summarized the law concerning a cause of action based upon a deprivation of a liberty interest:

> Notwithstanding the absence of a property interest, a procedural due process hearing may still be necessary if a liberty interest is implicated. Rich v. Secretary of the Army, 735 F.2d 1220, 1226 (10th Cir. 1984). In Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), the Supreme Court considered the issue of whether the plaintiff who was allegedly defamed by a flier circulated by the police department bearing his name and photograph which supposedly depicting "active shoplifters" stated a claim for relief under 42 U.S.C. § 1983 and the Fourteenth Amendment. The Court concluded that injury alone to reputation does not violate the

liberty or property interests of the due process clause. The Court stated that there is "no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Id. at 702. The proper remedy for such an injury is through a state tort action for defamation. Id. at 697-699. In Paul, the Court concluded that the plaintiff had suffered no constitutional injury because he could not "assert denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment." Id. at 712.

Thus, in order to present a viable liberty deprivation claim, the plaintiff must demonstrate more than a mere injury to reputation; due process requirements are not triggered unless the injury to reputation is entangled with the loss of a more tangible interest. See Setliff, 850 F.2d at 1396. The plaintiff is also required to demonstrate that the publication of information was false and stigmatizing. See Derstein v. State of Kan., 915 F.2d 1410 (10th Cir 1990); Conoway v. Smith, 853 F.2d 789, 794 (10th Cir 1988); Sipes v. United

> States, 744 F.2d 1418, 1421 (10th Cir. 1984).
>
> ...
>
> A statement is not stigmatizing if it merely alleges incompetence, negligence, low productivity and dereliction. See Sullivan v. Stark, 808 F.2d 737, 739 (10th Cir. 1987). In order for a statement to be stigmatizing, a statement must allege dishonesty, stealing or some other allegation that gives rise to a 'badge of infamy,' public scorn, or the like; See Wells v. Hico Independent School Dist., 736 F.2d 243, 256 n. 16 (5th Cir. 1984); Bailey v. Kirk, 777 F.2d 567, 580, n. 18 (10th Cir. 1985)

758 F. Supp. at 1433-1434; see Jensen, 998 F.2d at 1558-1559.

Analysis

Due Process Claim

As the defendants suggest, Ndefru has failed to demonstrate that he has been deprived of a liberty or property interest. Essentially, the plaintiff's case boils down to whether

a university student has a property or liberty interest in having a proposed oral topic approved by his teachers and academic advisors. Simply put, Ndefru does not have a property or liberty interest in having his proposed topic on a gas sensor approved, irrespective of the fact that he may regard his proposed topic to be superior to topics approved for other students, and irrespective of his self-appraisal of the relative merits of his topical proposal and his academic advisors' recommended or required course of study. The plaintiff's disappointed expectations of researching a preferred topic are not a basis of any cognizable liberty or property interest. Nor does the fact that Ndefru's subsequent efforts

to overrule the decision of his academic advisors regarding his topical proposal were unsuccessful implicate a liberty or property interest.[3] In short, the plaintiff's complaint does not allege a sufficient factual basis to demonstrate that the defendants' actions have deprived him

---

[3] Ndefru's complaint on several occasions challenges the defendant's adherence to the applicable rules and regulations in considering his proposed topical area and in addressing his subsequent grievance. The court simply notes that the defendants' failure to rigidly adhere to the University's rules and regulations would not, in and of itself, serve as a basis for a § 1983 claim. See Newman v. Burgin, 930 F.2d 955, 960 (1st Cir. 1991) ("The Due Process Clause of the Constitution... does not require the University to follow any specific set of detailed procedures as long as the procedures the University actually follows are basically fair ones...").

of any liberty or property interest.[4]

Ndefru's claim that he has been deprived of liberty interests in his good name and reputation and his ability to pursue a career in chemistry fails for at least two reasons. First, there is no allegation that any of the unfavorable information about Ndefru has been disseminated to the public; the intra-university dissemination of this information cannot serve as basis for

---

[4] The plaintiff makes the blanket assertion that the defendants' actions ultimately lead to his dismissal from KSU. While such allegations might implicate a property or liberty interest, that allegation is not factually supported by a fair reading of the entire complaint. In fact, it appears that once the grievance committee's decision was reached, Ndefru was encouraged to find a new major professor to complete his studies at K.S.U.

this claim. Harris, 798 F.2d at 422-23 n. 2. Second, from the allegations found in Ndefru's complaint and the arguments made in his response to the defendants' motion, it does not appear that the defendants' actions and statements concerning his competency are stigmatizing. Moreover, "[d]amage to prospective employment opportunities is too intangible to constitute deprivation of a liberty interest," Jensen, 998 F.2d at 1559.

In sum, Ndefru's due process claims are dismissed for failure to state a claim upon which relief may be granted.

Fourth Amendment Claim

The Fourth Amendment to the United States Constitution protects a person's right to be secure from

unreasonable searches and seizures. United States v. Walsh, 791 F.2d 811, 814 (10th Cir. 1986). The Fourth Amendment to the Constitution is applicable to the states through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961). "The protections of the fourth amendment, however, apply only to governmental action; a search or seizure, even if unreasonable, performed by a private person not acting as a government agent or in concert with a government official is not within the scope of the fourth amendment." Walsh, 791 F.2d at 814 (citing United States v. Jacobsen, 466 U.S. 109, 113 (1984)). "The test for determining whether one is acting as a government agent is whether 1) the government knew of the

acquiesced in the intrusive conduct; and 2) the party performing the search intended to assist law enforcement efforts or further his own ends." United States v. Lowe, 999 F.2d 448, 450 n. 4 (10th Cir. 1993) (citing Pleasant v. Lovell, 876 F.2d 787, 797 (10th Cir. 1989)).

Assuming, arguendo, that Ndefru has a reasonable expectation of privacy in the pile of papers which Dr. Sherwood searched, and assuming, arguendo, that Dr. Sherwood's search was unreasonable under the circumstances, Ndefru has failed to allege sufficient facts to demonstrate that Dr. Sherwood was acting as a government agent at the time he searched for the "nickel" papers. Therefore, Ndefru's Fourth Amendment

claims necessarily fail.

IT IS THEREFORE ORDERED that the defendants' motion to dismiss (Dk. 12) is granted.

Dated this 29th day of December, 1993, Topeka, Kansas.

/s/ Sam A. Crow
U.S. District Judge

APPENDIX R-C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-3021

MIKE M. NDEFRU,

Plaintiff-Appellant

v.

DR. PETER M.A. SHERWOOD; DR. DALE M. HAWLEY; DR. KENNETH J. KLABUNDE; DR. MICHAEL J. O'SHEA; TIMOTHY R. DONOGHUE, Dean; BRADLEY FENWICK, Dean; ELIZABETH A. UNGER, Dean,

Defendants-Appellees.

ORDER
Entered September 7, 1994

Before MOORE and KELLY, Circuit Judges, and BABCOCK, District Judge.

---

*Honorable Lewis T. Babcock, District Judge, United States District Judge for the District of Colorado, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court

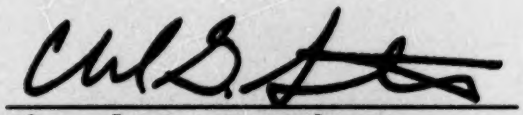
PATRICK FISHER, Chief Deputy Clerk

By /s/ Jim Powers
Deputy Clerk

CERTIFICATE OF SERVICE

I, Cheryl G. Strecker, hereby certify that I served three copies of the foregoing Respondents' Brief In Opposition by depositing the same in the U.S. mail, postage prepaid, this 21st day of Dec., 1994, addressed to:

Mike M. Ndefru
P.O. Box 234
Manhattan, KS 66502-0002



Cheryl G. Strecker
Assistant University Attorney
Kansas State University
111 Anderson Hall
Manhattan, KS 66506-0115
(913)532-5730

Supreme Court, U.S.
FILED
JAN 3 1995
OFFICE OF THE CLERK

(3)

NO. 94-1014

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MIKE M. NDEFRU,

PETITIONER,

VS.

DR. PETER M.A. SHERWOOD, DR. DALE M. HAWLEY, DR. KENNETH J. KLABUNDE, DR. MICHAEL J. O'SHEA, DEAN TIMOTHY R. DONOGHUE, DEAN BRADLEY FENWICK, DEAN ELIZABETH A. UNGER,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

MIKE M. NDEFRU, PETITIONER
P.O. BOX 234
MANHATTAN, KANSAS 66502-0002
(913) 537-4669

19 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED.....ii

NO VALID ARGUMENTS PRESENTED AGAINST GRANTING OF PETITION.....2

1. Questions presented need no modification.....2

2. Unsubstantiated claim of confusion and inaccuracies....3

3. Supreme Court has jurisdiction.....4

4. No basis for claiming violation of Rule 14 of the Supreme Court.....12

5. Association of due process with rejection and disagreement still unsubstantiated.....13

6. Association of property and liberty interest with approval of a topic.....14

7. Valid basis for qualified immunity claim still unestablished.....15

CONCLUSION.....16

TABLE OF AUTHORITIES CITED

Page

CASES

Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978).....11

Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1975).....6, 7

New Jersey v. T.L.O., 469 U.S. 325 (1985).....7

Newman v. Burgin, 930 F.2d 955, 960 (1st Cir. 1991)..10

STATUTE

United States Code,

42 U.S.C. § 1983.....4, 5

United States Constitution,

Fourth Amendment.....7, 9

Fourteenth Amendment.....6

OTHERS

Rules of the Supreme Court,

Rule 10.1(a).....4, 5

Rule 10.1(c).....4, 5, 6, 9

Rule 14.1(e)(iv).....5

NO. 94-1014

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1994

MIKE M. NDEFRU,

PETITIONER,

vs.

PETER M. A. SHERWOOD, et al.,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

NO VALID ARGUMENTS PRESENTED AGAINST GRANTING PETITION

1. Questions presented need no modification

The respondents' attorney gave no reason for being dissatisfied with the petitioner's questions presented (Resp. Brf. Opstn. at (i)). The attorney only stated her/his desire. Just being dissatisfied is not a reasonable basis for altering or rejecting the petitioner's "QUESTIONS PRESENTED".

The attorney's question presented support granting of the petition. Basis for associating due process with rejection should be established. Among other issues, the reasonableness of conducting a search of an office just by claiming to have lent or by lending an

item associated with academics needs to be shown.

2. Unsubstantiated claim of confusion and inaccuracies

The respondents' attorney gave no example of her/his claim that the petitioner's reproduction of the opinions of the courts below "contains numerous inaccuracies" (Resp. Brf. Opstn. at 1).

The attorney, without giving examples, also claimed the petitioner's statements are "confusing and replete with inaccuracies" (Resp. Brf. Opstn. at 8).

The petitioner perceives the attorney's claims as fabrications with the intention to evade responding to issues raised by the petitioner. The attorney's opinions support that the Supreme Court review this case. The

petition should be granted.

3. Supreme Court has jurisdiction

The respondents' attorney questions the jurisdiction of the Supreme Court over this case (Resp. Brf. Opstn. at 6, 7, 15 & 16).

The petitioner states that the Supreme Court has jurisdiction over this case based on (1) Rules 10.1(a) and 10.1(c) of the Supreme Court, and (2) on the fact that the petitioner's claim is a 42 U.S.C. § 1983 claim, that protects the petitioner's constitutional rights. Constitutional and statutory provisions appear in the petition (Petn. Wrt. at 4; Appen. Petn. Wrt. at 94 to 96).

A. The district court and the 10th Cir. have failed to administer justice in this case. The petitioner's 42 U.S.C. § 1983 claim has not be resolved. The Supreme Court is the

"next stage" for the redress of the petitioner's 42 U.S.C. § 1983 claim. Supreme Court Rule 14.1(e)(iv) is met. The Supreme Court has jurisdiction over this case.

B. In the respondents' attorney's arguments regarding Rules 10.1(a) and 10.1(c) -- Resp. Brf. at 6, 7 & 16 -- she/he left out the following: "When a United States court of appeals ... has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision" (Part of Supreme Court Rule 10.1(a)). The attorney's presentation of Supreme Court Rule 10.1(a) is evidence of deliberate omission, misstatement and evasion of facts in this case. The presentation also brings to question the attorney's claim that

she/he accurately reproduced the opinions of the courts below in the respondents' brief in opposition, and that the petitioner's reproduction of the opinions of the courts below has "numerous inaccuracies" (Resp. Brf. Opstn. at 1). The petition should be granted. The Supreme Court has jurisdiction.

C. The Supreme Court also has jurisdiction pursuant to Rule 10.1(c) of the Supreme Court.

(i) Even in temporary suspension, due process is required. In Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1975), "The Supreme Court without hearing held that students facing temporary suspensions from a public school have property and liberty interest and are protected by the Due Process Clause of the Fourteenth Amendment. Students faced with such

potential losses of liberty must be given oral or written notices of the charges against them along with the opportunity at a hearing to present their version of what happened."

If students facing temporary suspension have the right to due process, dismissal of the petitioner from his career pursuit in Surface Science at Kansas State University (K.S.U.) required due process.

(ii) Should the petitioner's Fourth Amendment claim be tried in the federal courts? Yes.

a. The search of the petitioner's belongings in his office was unreasonable. In New Jersey v. T.L.O, 469 U.S. 325 (1985), the court held that the Fourth Amendment prohibits unreasonable searches by public school officials (Petn. Wrt. at 51 & 97). The petitioner holds that the Fourth

Amendment would be worthless in an academic setting if just lending or claiming to have lent an item associated with academics is justifiable reason to conduct a search of an office. The unreasonable search needs to be addressed by the Supreme Court.

b. The district court claimed that the petitioner cold not show that Respondent Sherwood was acting as a government official, in the search (Petn. Wrt. at 50 & 87). Discovery was stayed (Petn. Wrt. at 50 & 88).

The lower courts ignored the fact that K.S.U. and the Chemistry Department of K.S.U. benefit from the funds associated with Respondent Sherwood's research. Respondent Sherwood was therefore a government official when he searched the petitioner's belongings for the claimed research papers. This issue should be reviewed by the Supreme Court.

The lower courts also ignored the fact that aspects of Respondent Sherwood's research publications have been used in students' dissertations, K.S.U. functions. Respondent Sherwood was a government official when he conducted the search. This issue needs to be addressed by the Supreme Court.

The lower courts ignored the fact that the petitioner had previously told Respondent Sherwood that the petitioner had a book that could prove violations regarding the treatment of his proposal, a K.S.U. function. The lower courts ignored the fact that Respondent Sherwood was a government official when he searched the petitioner's office for the claimed nickel research papers. Reasonably a government official is not deemed a "private person" (Petn. Wrt. at 86) just for the purpose of dismissing a Fourth Amendment claim. Rule 10.1(c)

should stand.

(iii) The district court, ignoring to establish fairness in respondents' actions, cited Newman v. Burgin, 930 F.2d 955, 960 (1st Cir. 1991). The court stated that no "specific set of detailed procedures" need to be followed as long as procedures followed are fair (Petn. Wrt. at 83 & 84). The district court failed (1) to consider regulations, and (2) to establish fairness in the procedures followed by respondents. Such failure indicates that the court's statement about regulations and fairness are in conflict with the 1st Cir.'s opinion, in the Newman case, cited by the district court. The district court failed to apply the opinion of the 1st Cir. to the petitioner's case.

The district court's approach to

regulations also conflict with the opinions of state courts of Kansas. state courts of Kansas have acknowledged the importance of regulations, and adherence to regulations have been considered in the granting of immunity (Petn. Wrt. at 15, 16, 98, 99).

The lower courts' failure to consider regulations conflict with the Supreme Court's consideration of adherence to established rules in Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978) (Petn. Wrt. at 18).

Violations of regulations and absence of fairness in respondents' actions contributed to the destruction of the petitioner's career pursuit. The Supreme Court has jurisdiction to settle the conflict regarding regulations and fairness. Reasonably, regulations are not only important when they favor the granting of immunity (Petn. Wrt. at 15,

16 & 98 to 99), and when they favor dismissal of a case. Fairness cannot be demonstrated in respondents' actions. The conflict regarding regulations and fairness needs to be addressed. The petition should be granted.

4. No basis for claiming violation of Rule 14 of the Supreme Court

The respondents' attorney gave no example to support the attorney's claim of lack of "accuracy, brevity, or clearness" in the petition for the writ (Resp. Brf. Opstn. at 7 & 17). Also, the use of "or" -- not "and", for example -- by the attorney indicates uncertainty in the attorney's statement. The attorney has failed to support her/his claims of violation of Rule 14 of the Supreme Court.

5. Association of due process with rejection and disagreement still unsubstantiated

The respondents' attorney failed to show the basis for (1) the attorney's, (2) the district court's, and (3) the 10th Cir.'s claim that the petitioner associated due process with rejection (Petn. Wrt. at 11 & 13; Resp. Brf. Opstn. at (i) & 3; Appen. Petn. Wrt. at 57 & 64). Dismissal of the petitioner was ignored.

The attorney also failed to show the basis for associating due process with disagreement (Petn. Wrt. at 12).

This problem of association needs to be addressed. The petition should be granted.

6. Association of property and liberty interest with approval of a topic still unsubstantiated

The respondents' attorney failed to show the basis of the district court's association of property and liberty interest with approval of a proposed oral topic (Petn. Wrt. at 13 & 82).

The attorney simply restated opinions of the courts below and evaded addressing the petitioner's arguments regarding the opinions.

It is common understanding that courts have a commitment to administer justice, not a commitment to dismiss a case. A case cannot be justifiably dismissed on false claims.

The petition should be granted. Bases for the due-process, and property-and-liberty-interest statements need to be established.

7. Valid basis for qualified immunity claim still unestablished

The respondents' attorney has failed to resolve the contradiction between her/his claim to the 10th Cir. that the respondents are entitled to qualified immunity and her/his claim that the district court was right in dismissing the case. The attorney also failed to state why it was not clear at the time of respondents' violations that respondents were violating the petitioner's constitutional rights (Petn. Wrt. at 38 & 39). The 10th Cir. ignored the admission of guilt. The Supreme Court has the authority to review the opinions of the lower courts in this case. The petition should be granted.

On the whole, the respondents' attorney has failed to raise any valid

arguments against granting of the petition. The attorney has simply restated opinions of the lower courts, opinions which require that records of the lower courts be reviewed to enable the Supreme Court to have proper knowledge of the facts involved in this case. A rational decision can only be made through the acquisition of proper knowledge of the facts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Mike M. Ndefru, Petitioner
P.O. Box 234
Manhattan, Kansas
66502-0002
(913) 537-4669